

## ISF Temp Loan Rulemaking Record, as of January 15, 2021

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**ADMINISTRATIVE RECORD**

**ISF Temp Loan Rulemaking Record**

**(as of January 15, 2021)**



## **DEPARTMENT OF NATURAL RESOURCES**

### **Colorado Water Conservation Board**

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

##### **2 CCR 408-2**

##### **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 water right for the same lake or reach of stream and exercises the rights independently 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 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 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 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 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.

**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 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 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 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.

**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.**

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 Person 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 Person 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 Person 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 Person 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 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 regardless of the individual depletive effect of 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 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:

- (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 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, and 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: (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 address the 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 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 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.
- (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 of NLL water right(s); and
  3. Potential impact to the natural environment of the affected stream reach(es) or lake from 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:
- 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;
  - vi. Administrability of proposed alternatives by the Board and the Division Engineer; 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.

**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 6m., 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.

# An Act

HOUSE BILL 20-1157

BY REPRESENTATIVE(S) Roberts and Will, Arndt, Bird, Buentello, Cutter, Duran, Esgar, Exum, Froelich, Kennedy, Kipp, McCluskie, McKean, McLachlan, Michaelson Jenet, Sandridge, Snyder, Soper, Titone, Valdez D., Woodrow, Young, Becker;  
also SENATOR(S) Donovan, Bridges, Gonzales, Hansen, Moreno, Rodriguez, Winter, Zenzinger, Garcia.

CONCERNING THE COLORADO WATER CONSERVATION BOARD'S AUTHORITY  
TO USE WATER THAT A WATER RIGHT OWNER VOLUNTARILY LOANS TO  
THE BOARD FOR INSTREAM FLOW PURPOSES.

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

**SECTION 1.** In Colorado Revised Statutes, 37-83-105, **amend** (1), (2)(a) introductory portion, (2)(a)(IV), (2)(a)(V), (2)(b) introductory portion, (2)(b)(I) introductory portion, (2)(b)(II), (2)(b)(V), (2)(b)(VI), (2)(b)(VII), and (2)(b)(VIII); and **add** (2)(a)(III.5), (2)(a)(III.7), (2)(a)(VI), (2)(b)(II.5), and (3) as follows:

**37-83-105. Owner may loan agricultural water right - loans to Colorado water conservation board for instream flows - rules.**  
(1) (a) Subject to the limitations of this subsection (1) and pursuant to the

---

*Capital letters or bold & italic numbers indicate new material added to existing law; dashes through words or numbers indicate deletions from existing law and such material is not part of the act.*

procedures set forth in ~~paragraph (b) of subsection (2)~~ SUBSECTION (2)(b) of this section THAT APPLY TO AN EXPEDITED LOAN DESCRIBED IN SUBSECTION (2)(a)(III.7) OF THIS SECTION, the owner of a water right decreed and used solely for agricultural irrigation purposes may loan all or a portion of the water right to another owner of a decreed water right on the same stream system and that is used solely for agricultural irrigation purposes for no more than one hundred eighty days during any one calendar year if the ~~division~~ STATE engineer approves ~~such~~ THE loan in advance and the loan does not cause injury to other decreed water rights.

(b) THE OWNER OF ANY DECREED WATER RIGHT MAY LOAN WATER TO THE COLORADO WATER CONSERVATION BOARD FOR USE AS INSTREAM FLOWS:

(I) TO PRESERVE THE NATURAL ENVIRONMENT TO A REASONABLE DEGREE PURSUANT TO A DECREED INSTREAM FLOW WATER RIGHT HELD BY THE BOARD; OR

(II) TO IMPROVE THE NATURAL ENVIRONMENT TO A REASONABLE DEGREE FOR A STREAM REACH FOR WHICH THE BOARD HOLDS A DECREED INSTREAM FLOW WATER RIGHT.

(2) (a) ~~A water right owner may loan water to the Colorado water conservation board for use as~~ WATER MAY BE USED FOR instream flows pursuant to a ~~decreed instream flow water right held by the board~~ LOAN AUTHORIZED UNDER THIS SECTION for a period not to exceed one hundred twenty days IN A SINGLE CALENDAR YEAR, subject to the following:

(III.5) WATER RIGHTS LOANED PURSUANT TO THIS SECTION 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.

(III.7) AN EXPEDITED LOAN APPROVED TO PRESERVE THE NATURAL ENVIRONMENT TO A REASONABLE DEGREE PURSUANT TO THIS SUBSECTION (2)(a) HAS A TERM OF UP TO ONE YEAR. THE LOAN PERIOD BEGINS WHEN THE STATE ENGINEER APPROVES THE EXPEDITED LOAN. IF AN EXPEDITED LOAN IS APPROVED, THE APPLICANT SHALL NOT REAPPLY FOR AN ADDITIONAL EXPEDITED LOAN OF THE WATER RIGHT.

(IV) (A) A RENEWABLE loan approved TO PRESERVE OR IMPROVE THE NATURAL ENVIRONMENT TO A REASONABLE DEGREE pursuant to this ~~paragraph (a) shall~~ SUBSECTION (2)(a) MUST not be exercised for more than ~~three~~ 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. The ten-year period ~~shall begin~~ BEGINS when the state engineer approves the loan. AN APPLICANT MAY REAPPLY FOR AND the state engineer ~~shall not~~ MAY approve a RENEWABLE loan pursuant to this ~~paragraph (a)~~ SUBSECTION (2)(a) for ~~another~~ UP TO TWO ADDITIONAL ten-year period; ~~except that, if the agreement has not been exercised during the term of the agreement, an applicant may reapply one time by repeating the application process pursuant to this subsection (2)~~ PERIODS.

(B) IF AN APPLICANT HAD PREVIOUSLY BEEN APPROVED FOR AND HAD EXERCISED AN EXPEDITED LOAN PURSUANT TO SUBSECTION (2)(a)(III.7) OF THIS SECTION AND SUBSEQUENTLY APPLIES AND IS APPROVED FOR A RENEWABLE LOAN, THE ONE-YEAR LOAN PERIOD OF THE EXPEDITED LOAN COUNTS AS THE FIRST YEAR OF THE FIVE-YEAR ALLOWANCE FOR THE SUBSEQUENT RENEWABLE LOAN.

(C) IN EACH YEAR THAT A RENEWABLE LOAN IS EXERCISED, THE APPLICANT SHALL PROVIDE THE WRITTEN NOTICE DESCRIBED IN SUBSECTION (2)(b)(II) OF THIS SECTION.

(V) A party may file comments concerning potential injury to ~~such~~ THE party's water rights or decreed conditional water rights due to the operations of the loan of ~~a~~ THE water right ~~to a decreed instream flow right~~ with the state engineer by January 1 of the year following each year that the loan is exercised. The procedures of ~~paragraph (b) of this subsection (2)~~ SUBSECTION (2)(b) OF THIS SECTION regarding notice, opportunity to comment, the state engineer's decision, and an appeal of ~~such~~ THE decision shall again be followed with regard to ~~such~~ THE party's comments. IN AN APPEAL TO THE WATER JUDGE IN THE APPLICABLE WATER DIVISION OF THE DETERMINATION MADE BY THE STATE ENGINEER PURSUANT TO THIS SECTION, THE APPLICANT HAS THE BURDEN OF PROOF THAT THE LOANED WATER RIGHT DOES NOT CAUSE INJURY TO OTHER VESTED OR CONDITIONALLY DECREED WATER RIGHTS. ANY APPEAL OF A DECISION BY THE STATE ENGINEER CONCERNING THE LOAN PURSUANT TO THIS SECTION SHALL BE MADE IN ACCORDANCE WITH THE PROCEDURES SET FORTH IN SUBSECTION (2)(b)(VIII) OF THIS SECTION.

(VI) RULES PROMULGATED BY THE COLORADO WATER CONSERVATION BOARD PURSUANT TO SUBSECTION (3) OF THIS SECTION.

(b) In determining whether injury will occur, the ~~division~~ STATE engineer shall ensure that the following conditions are met:

(I) The ~~proponent~~ APPLICANT has filed a request for approval of the loan with the ~~division~~ STATE engineer, together with a filing fee in the amount of ~~one~~ THREE hundred dollars. ~~Moneys from~~ THE STATE ENGINEER SHALL TRANSMIT the fee ~~shall be transmitted~~ to the state treasurer, and ~~deposited~~ WHO SHALL DEPOSIT THE FEE in the water resources cash fund created in section 37-80-111.7 (1). The request for approval ~~shall~~ MUST include:

(II) The ~~proponent~~ APPLICANT has SUBMITTED PROOF TO THE STATE ENGINEER, IN A FORM AND MANNER DETERMINED BY THE STATE ENGINEER, DEMONSTRATING THAT THE APPLICANT provided written notice of the request for approval of the loan by first-class mail or electronic mail to:

(A) 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 ~~proof of such notice is filed with the division engineer;~~

(B) 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.

(II.5) THE APPLICANT HAS PROVEN THAT THE LOAN WILL NOT INJURE DECREED WATER RIGHTS, DECREED EXCHANGES OF WATER, OR OTHER WATER USERS' UNDECREED EXISTING EXCHANGES OF WATER TO THE EXTENT THAT THE UNDECREED EXISTING EXCHANGES HAVE BEEN ADMINISTRATIVELY APPROVED BEFORE THE DATE OF THE FILING OF THE REQUEST FOR APPROVAL OF THE LOAN.

(V) The ~~division~~ STATE engineer has given the owners of water rights and decreed conditional water rights ~~fifteen days after the date of mailing of notice under subparagraph (II) of this paragraph~~ (b) THE OPPORTUNITY to file comments on the proposed loan ~~except that the division engineer may act on the application immediately after the applicant~~



~~provides evidence that all persons entitled to notice of the application under subparagraph (II) of this paragraph (b) have either consented to or commented on the application. Such~~ WITHIN THE RELEVANT TIME FRAME INDICATED IN THIS SUBSECTION (2)(b)(V). THE comments ~~shall~~ MUST include any claim of injury or any terms and conditions that should be imposed upon the proposed loan to prevent injury to a party's water ~~right~~ RIGHTS and any other information the commenting party wishes the ~~division~~ STATE engineer to consider in reviewing the proposed loan. THE STATE ENGINEER SHALL PROVIDE THE PARTIES ENTITLED TO NOTICE UNDER SUBSECTION (2)(b)(II) OF THIS SECTION:

(A) FIFTEEN DAYS AFTER THE DATE OF MAILING OF NOTICE FOR EXPEDITED LOANS AUTHORIZED UNDER SUBSECTION (2)(a)(III.7) OF THIS SECTION TO PROVIDE COMMENTS ON THE PROPOSED LOAN; AND

(B) SIXTY DAYS AFTER THE DATE OF MAILING OF NOTICE FOR RENEWABLE LOANS AUTHORIZED UNDER SUBSECTION (2)(a)(IV) OF THIS SECTION TO PROVIDE COMMENTS ON THE PROPOSED LOAN.

(VI) The ~~division~~ STATE engineer, after consideration of any comments received, has determined that the operation and administration of the proposed loan will not cause injury to other decreed water rights, DECREED EXCHANGES, OR UNDECREED EXCHANGES AS DESCRIBED IN SUBSECTION (2)(b)(II.5) OF THIS SECTION and, for loans made pursuant to ~~paragraph (a) of this subsection (2)~~ SUBSECTION (2)(a) OF THIS SECTION, will not affect Colorado's compact entitlements. The ~~division~~ STATE engineer shall impose such terms and conditions as are necessary to ensure that these standards are met. In making the determinations specified in this ~~subparagraph (VI)~~ SUBSECTION (2)(b)(VI), the ~~division~~ STATE engineer ~~shall~~ NEED not ~~be required to~~ hold any formal hearings or conduct any other formal proceedings, but may conduct a hearing or formal proceeding if the ~~division~~ STATE engineer finds it necessary to address the issues.

(VII) The ~~division~~ STATE engineer shall approve or deny the proposed loan within ~~twenty~~ TEN days after the ~~date of mailing of notice under subparagraph (II) of this paragraph (b), or within five days after the applicant provides evidence that all persons entitled to notice of the application under subparagraph (II) of this paragraph (b) have either consented to or commented on the application, whichever is earlier~~ PERIOD FOR COMMENTS ON THE PROPOSED LOAN SPECIFIED IN SUBSECTION (2)(b)(V)

OF THIS SECTION HAS EXPIRED.

(VIII) When the ~~division~~ STATE engineer approves or denies a proposed loan, the ~~division~~ STATE engineer shall serve a copy of the decision on all parties to the application by first-class mail or, if ~~such~~ THE parties have so elected, by electronic mail. Neither the approval nor the denial by the ~~division~~ STATE engineer ~~shall create~~ CREATES any presumptions ~~shift the burden of proof, or serve~~ OR SERVES as a defense in any legal action that may be initiated concerning the loan. ~~Any~~ A PARTY MAY FILE AN appeal of a decision by the ~~division~~ STATE engineer concerning the loan pursuant to this section ~~shall be made~~ to the water judge in the applicable water division within fifteen days after the date ~~on which~~ THAT THE STATE ENGINEER, FOLLOWING THE STATE ENGINEER'S CONSIDERATION OF ANY COMMENTS SUBMITTED PURSUANT TO SUBSECTION (2)(a)(V) OF THIS SECTION, SERVES the decision ~~is served~~ on the parties to the application. THE APPLICANT HAS THE BURDEN OF PROOF TO DEMONSTRATE THAT THE LOANED WATER RIGHT DOES NOT CAUSE INJURY TO OTHER VESTED OR CONDITIONALLY DECREED WATER RIGHTS, DECREED EXCHANGES, OR UNDECREED EXCHANGES AS DESCRIBED IN SUBSECTION (2)(b)(II.5) OF THIS SECTION. The water judge shall hear ~~such~~ AND DETERMINE THE appeal on an expedited basis USING THE PROCEDURES AND STANDARDS SET FORTH IN SECTION 37-92-304 (3) CONCERNING MATTERS REREFERRED TO THE WATER JUDGE BY THE WATER REFEREE.

(3) THE COLORADO WATER CONSERVATION BOARD SHALL PROMULGATE RULES REGARDING THE FOLLOWING NECESSARY STEPS FOR ITS REVIEW AND ACCEPTANCE OF LOANS FOR INSTREAM FLOW USE PURSUANT TO SUBSECTION (1)(b)(II) OF THIS SECTION:

(a) THE BOARD'S REVIEW OF THE PROPOSED LOAN, INCLUDING A REQUIREMENT THAT THE BOARD REQUEST AND REVIEW A BIOLOGICAL ANALYSIS FROM THE DIVISION OF PARKS AND WILDLIFE CONCERNING THE EXTENT TO WHICH THE PROPOSED LOAN WILL IMPROVE THE NATURAL ENVIRONMENT TO A REASONABLE DEGREE;

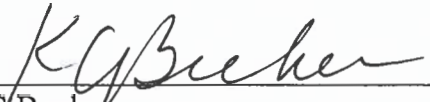
(b) A REQUIREMENT THAT WHEN CONSIDERING A PROPOSED LOAN, THE BOARD SHALL GIVE PREFERENCE TO LOANS OF STORED WATER, WHEN AVAILABLE, OVER LOANS OF DIRECT FLOW WATER; AND

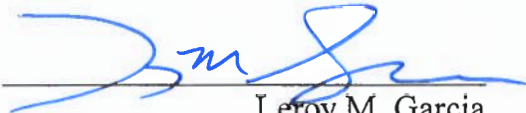
(c) THE BOARD'S DETERMINATION, AFTER A HEARING ON THE

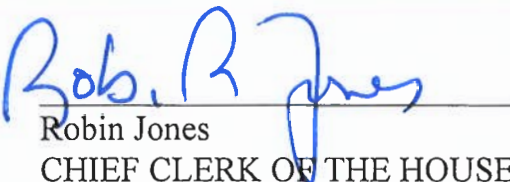
MATTER, IF REQUESTED, WHETHER TO ACCEPT THE PROPOSED LOAN.

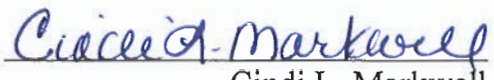
**SECTION 2. Act subject to petition - effective date - applicability.** (1) This act takes effect at 12:01 a.m. on the day following the expiration of the ninety-day period after final adjournment of the general assembly (August 5, 2020, if adjournment sine die is on May 6, 2020); except that, if a referendum petition is filed pursuant to section 1 (3) of article V of the state constitution against this act or an item, section, or part of this act within such period, then the act, item, section, or part will not take effect unless approved by the people at the general election to be held in November 2020 and, in such case, will take effect on the date of the official declaration of the vote thereon by the governor.

(2) This act applies to conduct occurring on or after the applicable effective date of this act.

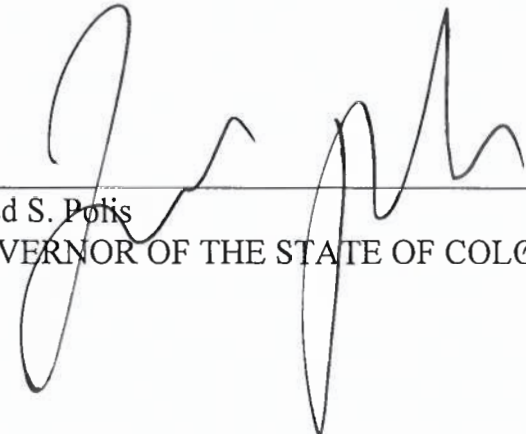
  
KC Becker  
SPEAKER OF THE HOUSE  
OF REPRESENTATIVES

  
Leroy M. Garcia  
PRESIDENT OF  
THE SENATE

  
Robin Jones  
CHIEF CLERK OF THE HOUSE  
OF REPRESENTATIVES

  
Cindi L. Markwell  
SECRETARY OF  
THE SENATE

APPROVED March 20, 2020 at 12:50 pm  
(Date and Time)

  
Jared S. Polis  
GOVERNOR OF THE STATE OF COLORADO

### 3. Stakeholder meeting 8/3/2020

## 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. Renewable loans, which can be used to preserve or improve the natural environment, 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. 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 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 prepare 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 written public notice required by section 37-83-105(2)(b)(II), C.R.S. 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 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 amount or extend beyond the CWCB's decreed instream flow reach 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 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.
- (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. 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;
  - 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
  - ii. provide the written notice required by section 37-83-105(2)(b)(II) 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) 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).
- (h) At the end of or after the first ten-year period of a renewable loan, the applicant may reapply for a loan, and the State Engineer may approve such loan for an additional ten-year period. At the end of or after the second ten-year period of a renewable loan, the applicant may reapply for a loan, and the State Engineer may approve such loan for one additional ten-year period. 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 may hear public comment and objections to the renewal 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.
  - ~~(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.

- (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.

**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.**

...

**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.**

...

**(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:

...

- (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 CPW~~DOW~~) 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.

...



(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.

...

- (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:

...

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.



STATE OF  
COLORADO

White - DNR, Kaylea <kaylea.white@state.co.us>

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## Notice of Stakeholder Meeting on ISF Rules Revisions to Implement HB20-1157

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**rob.viehl@state.co.us** <rob.viehl@state.co.us>

Wed, Jul 22, 2020 at 11:28 AM

To: rob.viehl@state.co.us

The CWCB staff has drafted proposed revisions to the Rules Concerning Colorado's Instream Flow and Natural Lake Level Program ("ISF Rules"). The revisions to the ISF Rules will: (1) address the rulemaking requirements of HB20-1157; (2) update a reference to the CWCB's website; and (3) update references to Colorado Parks and Wildlife.

Staff will hold an informal stakeholder meeting on Monday, August 3, 2020 from 1:00 p.m. - 4:00 p.m. to discuss the [draft ISF Rules revisions](#). Staff invites interested parties to submit written comments on the draft ISF Rules revisions by emailing them to [linda.bassi@state.co.us](mailto:linda.bassi@state.co.us). Please submit comments by COB on July 29, 2020. Any comments received by that date will be posted on the [CWCB website](#) prior to the August 3 meeting. Written comments may be submitted after July 29, 2020, but might not be posted on the website prior to the August 3 meeting. At the meeting, CWCB staff and attendees will discuss the draft ISF Rules revisions, comments received prior to the meeting, and comments expressed at the meeting. If you have questions, contact Linda Bassi at [linda.bassi@state.co.us](mailto:linda.bassi@state.co.us) or (303) 866-3441, ext. 3204.

### Meeting Details:

Mon, Aug 3, 2020 1:00 PM - 4:00 PM (MDT)

Please join the meeting from your computer, tablet or smartphone.

<https://global.gotomeeting.com/join/454890797>

When you log in to the meeting, please provide your full name for our records.

You can also dial in using your phone.

United States: [+1 \(224\) 501-3412](tel:+12245013412)

Access Code: 454-890-797

New to GoToMeeting? Get the app now and be ready when your first meeting starts:

<https://global.gotomeeting.com/install/454890797>



3.c      Recording of Stakeholder Meeting 8/3/2020  
(Provided Separately)

I, Amber Marsh, Administrative Assistant for the Natural Resources & Environment Section of the Colorado Department of Law, personally listened to the recording of this meeting that took place on August 3, 2020, and transcribed the recording of the meeting to the best of my ability, and completed the transcription on October 28, 2020.

Amber J. Marsh

1-7-21

Date

1    **List of Attendees for August 3, 2020 ISF Rulemaking Stakeholder Meeting (held virtually)**

2

3    Aaron Citron

4    Abby Burk

5    Alan Ward

6    Alden Vanden Brink

7    Alex Handloff

8    Alyson Gould

9    Amy Pillboy

10    Andrea Cole

11    Annie Berlemann

12    Barbara Thompskins

13    Bassi, Linda

14    Ben Wade

15    Beth Van Vurst

16    Bill Wombacher

17    Brandy Logan

18    Brock

19    Callie Hendrickson

20    Casey Weaver

21    Daniel Spivak

22    David Graf

23    Drew Peternell

24    Dylan Peper

25    Ed Millard

26    Ed Miller

27    Ed Perkins

28    Emily Ibach

29    Erich Fowler

- 1 Erik Jorgensen
- 2 Fritz Holleman
- 3 Garin Vorthmann
- 4 Heather Greenwolf
- 5 Ian Stafford
- 6 Jason Roudebush
- 7 Jen Mele
- 8 Jojo La
- 9 Jordan Sanchez
- 10 Karlyn Armstrong
- 11 Kate Ryan
- 12 Kathleen Curry
- 13 Katie Birch
- 14 Kaylea White
- 15 Kelly Romero-Heaney
- 16 Ken Curtis
- 17 Kimberly A Ricotta
- 18 Laura Belanger
- 19 Lee Miller
- 20 Leslie Cannon
- 21 Lisa Walters
- 22 Marc Sarmiento
- 23 Michael Eytel
- 24 Michael Fiebig
- 25 Michael Gustafson
- 26 Mickey O'Hara
- 27 Orla Bannan
- 28 Pat Ratliff
- 29 Patti Johnson

- 1 Peter Fleming
- 2 Rena Griggs
- 3 Rob Harris
- 4 Robert Viehl
- 5 Roger Williams
- 6 Ryan Unterreiner
- 7 Scheel, Kara
- 8 Schneider, Susan
- 9 Seth Clayton
- 10 Sonja Chavez
- 11 Torie Jarvis
- 12 Tracy Kosloff
- 13 Tyler Benton
- 14 Zane Kessler
- 15

**CWCB ISF Rules Stakeholder Meeting - August 3, 2020 - Transcript**

Note: First few minutes of meeting not recorded due to technical issues; Bassi gave overview of draft Rules.

Linda Bassi: Um I think I think that we may just need to look into this and we're not... yeah we're not sure of-we didn't quite understand where this was go-where your comment was going and I think we need to um digest it and think about it some more. And figure out if we do need to add some language. Does anyone else have an opinion on this issue?

Ratliff: I would agree with Bill that it is just missing um and and making it part of the record is probably good for everybody. Thanks.

Bassi: Alright well we will um we'll look into this one and um stay tuned. So with that I will move on to um 6H which provides that um at the end of or after the first ten year period of a renewed loan, um the applicant may reapply for a loan and the State Engineer may approve such loan for a- an additional ten year period. Um and then at the end of the second 10 year period same thing for an additional 10 year period. And prior to such reapplication at a properly noticed public meeting staff will inform the Board about the exercise of the loan during previous periods and the Board may hear public comment and objections to the renewal at the public meeting. Okay, oh Ken Curtis? Okay, if the Board authorizes the renewal of the loan, staff will coordinate with the applicant to prepare and submit the necessary documentation to the State Engineer required by the statute and provide the written notice required by the statute. Um, Ken? I-I'm before I call on you to ask-answer -excuse me ask your question or make a comment um we did receive a written comment on this, a written comment from the Colorado Water Trust that um suggested starting-starting this section with just using the language from the bill that just says 'An applicant may reapply for a loan and the State Engineer may approve a renewable loan for up to two additional 10 year periods' replacing the first two sentences with that and um we

1 think that might be a better approach and we're inclined to make that change and so w-we're  
2 looking at that. Ken, did you have a question for us?

3 Curtis: Yeah.

4 Bassi: Or a comment?

5 Curtis: Sorry, I wanted to go back to uh 2(d) or at least just to hear your reasoning for the preference  
6 on the loans for stored water over direct flow. And it may be just I'm not familiar with the  
7 history of the bill. I just want to hear the reasoning for that. Thank you.

8 Bassi: Sure. Um the bill that is direct language from the bill and during discussions when that bill was  
9 being um negotiated uh legislated and talked about. There were many, many conversations and  
10 um many stakeholders thought that it would be good for our Board to first look at whether it's  
11 possible to do a loan of stored water. Um, I believe they thought there would be less impact to  
12 other water users from using water that had been stored in priority and then released for  
13 instream flow use.

14 Curtis: Thanks Linda.

15 Bassi: Sure. Um another comment we received on 6k(2)h um is right near the bottom of page 6. Um  
16 the sentence that says the Board may hear public comment and objections to the renewal at the  
17 public meeting. And um, we were asked-it was suggested that we replace may with shall. And I  
18 think that um the reason we had may is that just in case there isn't public comment. But I think  
19 that it would be clearer to say the Board shall hear any public comment and objections to the  
20 renewal presented at the public meeting. So um that is a change that-that we are planning on  
21 making in response to that comment. With that I will go to um 6-oh oh um we have a new caller.  
22 Will you please give us your full name and um who you represent?

1 Vasquez: This is Barbara Vasquez, North Platte Basin Roundtable.

2 BassiL Thank you Barbara, hello.

3 Vasquez: Hi. Sorry I'm late.

4 Bassi: Um so 6k(3) is language that comes directly from the bill and provides that water rights loaned  
5 to the Board pursuant to expedited or renewable loans are not precluded from concurrent or  
6 subsequent inclusion in a water conservation, demand management, compact compliance or  
7 water banking program or plan, as is or may be subsequently defined or described in statute.  
8 And um, this is- I remember during the legislative process this language was requested by um at  
9 least one stakeholder. I think it was several. And we have received a comment on this one that  
10 um says that clarification is required at the rule is a bit unclear. Loaned water should be included  
11 within other programs, taking into consideration the cumulative impacts of each program.  
12 However the water right holders should only be compensated through one program while  
13 receiving credit for providing water to the stream. And we um we had comments from three  
14 entities um all to the same effect. And since this language is directly from the bill we're reluctant  
15 to change it and I think that when a proposed renewable loan is brought to our Board if it is also  
16 participating in another program that someone who is concerned about that dual participation  
17 can raise that issue to our Board. Um, and conversely, if the proposal for participation in one of  
18 these other programs comes to our Board if our Board is the entity um implementing that  
19 program the same thing that-that-that could be raised as an issue.

20 (inaudible)

21 Bassi: Uh Kathleen did you have question on this rule that rule 6k(3) or or were you moving on to 6m?

22 Curry: I uh I had a question on 6m.



1 Bassi: Ask away.

2 Curry: So I typed it in the chat box, Linda, just trying to make life easier.

3 Bassi: I-alright-let me-I-I just need help re-finding the chatbox which I'm getting that right now. Okay, I  
4 see it. So I'm assuming everyone can see it? I guess I'll read it since we have some people on the  
5 phone Um question on the hearing process: when we get to section 6m. If I'm understanding  
6 this, people would need to request party status to participate in the hearing. In 6m(5) it may  
7 make sense to include information right in the notice itself regarding the time frame and  
8 process for obtaining party status just so that folks know that if they want to file for party status  
9 there is a time limit to do that. Um we definitely will do that. I think that I know we do that in  
10 our new appropriation process.

11 Curry: Okay.

12 Bassi: We do that in our new appropriation process because yeah the notice wouldn't be very helpful  
13 if it didn't tell you how to get involved Um so this is for notice of a hearing, Kathleen? And your  
14 looking-you're in 6m(5)d where we're talking about written notice?

15 Curry: Yeah.

16 Bassi: Where we're talking about notice? Yeah we can add some language to that effect.

17 Curry: Thank you.

18 Bassi: I'm making a note so please bear with me. Or I guess other people are making that note and I  
19 don't have to (chuckle) I have people. Um alright so-so I'm going to go to the top of 6m Um 6m  
20 is an existing rule that um governs hearings on on other types of water acquisitions so we have  
21 um incorporated the temporary um renewable loans into this section. So we'll go right down to  
22 6m(5) because that is the first part of 6m that applies to those uh types of loans. And the

1 specifically 6m(5)d which is what we were just talking about with the notice. So um for hearings  
2 on renewable loans at least 30 days prior to the hearing date the Board will provide written  
3 notice of the hearing to the owner of the water right to be loaned and to all parties on the SWSP  
4 notification list for the water division where the loan's located and to the registered agent of  
5 those entities as required by um the statute. And we will add some language um saying that  
6 that will include information on deadlines for um becoming a party. So thank you for that  
7 suggestion, Kathleen. That's will be helpful. So um these are these rules e,f,g,h and I, let's see  
8 through m -we haven't changed them. These are the rules that apply to Board hearings and  
9 water acquisitions And, let's see, um we did receive a comment that pertains to notice um  
10 saying that it should also include legal publication in the newspaper of local circulation in the  
11 community affected by the instream flow loan. And you know-we have-staff has worked with  
12 our Board on notice over the years of all instream flow activities and over the years has  
13 increased the type of notice that it um provides. And our Board has determined that um  
14 adequate notice of actions that we take on-on instream flow appropriations and acquisitions um  
15 are to the instream flow subscription mailing list, posted at our website and also that you'll see  
16 them at our Board meeting agendas. Um the statute for renewable loans also adds the  
17 Substitute Water Supply Plan notification list. Um, we think that there could be timing and other  
18 issues with trying to publish in the newspaper and um aren't-aren't inclined to-to recommend  
19 that that be part of this rule.

20 (inaudible)

21 Um, Michael Gustafson, do you have a comment for us?

22 Gustafson: Um, can you hear me?

23 Bassi: Yes.

1 Gustafson: Okay, I actually tried to chime in when we were talking about k up above. But you  
2 apparently could not hear me. So I had a couple questions about that section primarily being  
3 whether or not there needs to be language added basically to the effect that the Board couldn't  
4 take action to uh take final action directing staff to accept the renewable loan unless the State  
5 Engineer has made its determination of no injury per the statute. Similar language was included  
6 with regard to the uh expedited loans up above but I didn't see it with regards to renewable  
7 loans. I'm wondering first of all whether you thought it would be necessary and if not-why so?

8 Bassi: Well the difference is that with the expedited loans we um applied to the State Engineer for  
9 approval before we um our Director who has been delegated the authority to accept and  
10 exercise them before that happens and before we ask our Board for ratification. For renewable  
11 loans we are only -we are asking our Board for authorization to apply to the State Engineer for  
12 approval of the renewable loan. So all of the Board review and the public input that um it hears  
13 a-and the process it goes through, the findings that it makes all would culminate in a decision  
14 authorizing - well - if it were positive authorizing staff to work with the water rights owner to  
15 apply for approval to the State Engineer and then that loan couldn't be exercised until that  
16 approval had been obtained.

17 Gustafson: Yes, and I understood that but I didn't see any language to the effect that the approval  
18 couldn't be accepted until the Division Engineer had made the non-injury finding.

19 Bassi: I guess I'm not sure it's necessary because if the Board-what happens is that the Board's  
20 decision is that it directs its staff to move forward to apply for that approval. Maybe I am not  
21 understanding your question.

1 Gustafson: Maybe I am not articulating it right or I guess not understanding the process. Let's say  
2 then that the State Engineer finds that the pl-finds there's no injury, what's the next step for the  
3 Board?

4 Bassi: If-if the State Engineer approves the renewable loan, then the Director would sign the loan  
5 agreement and the loan would be exercised.

6 Gustafson: And I guess what I'm making is

7 Bassi: So-we did not

8 Gustafson: Oh.

9 Bassi: Go on.

10 Gustafson: Sounds like someone-Okay, what I was asking though is does there need to be language  
11 there that says that the Director can only take that final action if the non-injury determination  
12 by the State Engineer was made? Because that -there was similar language to that effect up  
13 above.

14 Bassi: I think that might be a good addition and we-we will um -we'll look at that and figure out a good  
15 place to add that.

16 Gustafson: Okay and and then it also might be good to add similar language when you're talking  
17 about renewing the loan for an additional 5 years or 10 years.

18 Bassi: Okay. Thank you, Michael.

19 Gustafson: Thank you.

20 (inaudible sentence or two in background)

1 Bassi: Hi, Callie. um we see your-your comment in the chat and are local water right holders unwilling  
2 to be part of the mailing list that we create specifically for this type of notice? (paused to listen  
3 to other speaker) W-well we will discuss this internally and figure that out but we may want to  
4 talk to some stakeholders about this issue. Okay. Um we have a new caller - will you please give  
5 your full name and who you represent? Whoever just called in? I'm not sure where I was.

6 (inaudible static)

7 Vasquez: Linda if you are referring to the 985 980 2986 number I dropped off and called back in.  
8 This is Barbara.

9 Bassi: Okay, we can't-we can't see phone numbers. All we see is caller one, caller two, so-

10 Vasquez: Oh, I'm sorry.

11 Bassi: No, that's fine.

12 Vasquez: Okay. I lost connection.

13 Bassi: Okay. Thank you. (inaudible sounds) Callie, chat oh okay, I think I figured it out. Um Callie I see  
14 your question. Sorry, your mic's not working. Um I would say that that I would assume that most  
15 people who own water rights are on the Substitute Water Supply Plan notification list so that  
16 they can watch for things that are happening in their area that could affect their water rights.  
17 And so that is one um method by which they would receive notice of this. Um also we would  
18 encourage people who are interested to sign up for the instream flow subscription mailing list.

19 Hendrickson: Oh Linda maybe I got it fixed.

20 Bassi: Oh good. Hi.

1 Hendrickson: Hi. Sorry, okay, um okay so that makes sense-some sense to me is that a list via mail or  
2 email? How are they notified?

3 Bassi: Um via email I think um for the substitute water supply plan is that email?

4 Vasquez: Mm-hm.

5 Bassi: And I don't know if specific um requests can be made to be received by mail. Or is email not a  
6 good method for some people?

7 Hendrickson: I think there's some that that probably does not work. So that's one of my questions -I  
8 mean they'd be few but they-they would be. So um yeah we can talk about that. Just looking for  
9 ways to get them and for instance the Conservation Districts, Conservancy Districts & County to  
10 all also receive that is-is our primary concern.

11 Bassi: Right. Also um a-and I believe that those entities are probably on these mailing lists. Also um  
12 the-the new bill and our rules require us to provide notice to the re- a registered agent uh of a  
13 ditch company, irrigation district, water users association, or other water supply or delivery eh-  
14 entity within whose system the water rights fall, um-

15 Hendrickson: Okay.

16 Bassi: I would think that those entities-I would hope that those entities would let their members or- or  
17 whatever you would call the people who are in that organization know about this because that-I  
18 think that-that's is partly why we are required to send them notice so that they can get the word  
19 out.

20 Hendrickson: Okay.

21 Bassi: So I'm hoping that would also be helpful to address your concern.

1 Hendrickson: Okay. Thank you.

2 Bassi: Does anyone have uh any um other comments or questions on the-the hearing process because  
3 if-if not I'll go out to just some general comments that we received. So we um....

4 Curry: Oh Linda, this is Kathleen-

5 Baasi: Hi Kathleen.

6 Curry: Curry. Um I was trying to remember the language calls for the applicant to be responsible for  
7 the notice and they can coordinate with staff. Is that uh how it was spelled out in the statute?

8 Bassi: Um, I'm pretty sure I actually-I-the-in the statute it just says applicant shall provide the written  
9 notice.

10 Curry: I can't believe I let that happen. (laughing)

11 Bassi: We have added coordination with staff because we know that it probably be very helpful to the  
12 applicant.

13 Curry: Yeah, they will need that kind of help. Thank you.

14 Bassi: So that was an addition that we made. So um we received some general comments that um  
15 suggest other-other factors that our Board would consider that-that kind of rise to the level of  
16 like a mini NEPA analysis and we've looked at that and-and-and we don't think this type of  
17 transaction merits this in depth of an analysis and the public process affords people the  
18 opportunity to raise specific concerns on a specific proposal to the Board and we think that that  
19 is-is a uh the way that those types of issues should be addressed. We also received a comment  
20 um- requ-um suggesting there should be more local communications um that if there are-are  
21 federal or state agencies identified in-in- involvement with these renewable loans like Colorado

1 Parks and Wildlife that the local staff um be knowledgeable about them or be in the loop about  
2 them, which I believe the Denver staff has uh started to do because we heard that from-from-  
3 stakeholders with all instream flow matters. So that is something um that we would do. And um  
4 we-also requesting that there would be a local hearing in the county where-where the  
5 temporary renewable loan is proposed. And um that is not something that-that our board is  
6 capable of doing. We could potentially provide for some type of of of remote meeting to talk  
7 about a proposal but um just from a resource standpoint uh I-I don't believe that-that  
8 something that we would be inclined to add to these rules.

9 Hendrickson: Linda, this is Callie again if you can hear me?

10 Bassi: Yes.

11 Hendrickson: So, and I'm the one that helped make some of those comments. Um so just a thought  
12 acknowledging that no the whole Board could not do that. But for instance when staff comes  
13 over and talks to the commissioners, because my understanding and and I'm kind of new to this  
14 process so bear with me. But my understanding is that staff comes over and makes a  
15 presentation to the county. And yes, if you've got county commissioners that totally understand  
16 the significance of that within you know to their community they would probably raise it-that  
17 awareness within the community for that. But sometimes you don't have commissioners that  
18 total understand that. So if the state could help insure that that happens and it still may be just  
19 the staff that is here and helps to coordinate that and maybe the Board member from that area  
20 could attend and participate so they hear that. So when they go back to the Board meetings for  
21 these conversations they would've heard it first hand as well. Would that be helpful? Just a  
22 thought.



1 Mele: Callie, this is Jen Mele with the AG's Office. I wanted to ask a question on that. So Callie are you  
2 actually talking about holding a hearing or now are you referring um to a meeting with the  
3 county commissioners like at their county commissioners public meeting or maybe just a  
4 meeting in general? I want to understand what your proposal is.

5 Hendrickson: So, I'm open to I-many i-any idea. My-our concern is that the local community more  
6 than just me being a voice or a county commissioner being a voice that there be more  
7 opportunity for local people to have input. And-and so it sounds like there's a way or an effort  
8 to get them more informed which I greatly appreciate. But then allowing them the opportunity  
9 to actually provide input and comments is-is our thought. So whether that be an actual hearing  
10 or just in case your CSCB staff-er- CWCB staff um working with commissioners to encourage  
11 them to have you know-notify people of the presentation that's going to happen at the  
12 Commissioner's meeting. I-I-I am just looking for opportunities and I don't have a real specific  
13 way to make it happen. I'm open for ideas.

14 Mele: Okay. That's great. I-I do believe for new appropriations CWCB staff will go to the County  
15 Commissioner meetings. I-I think I probably need a better understanding of how frequently  
16 those happen. I mean part of the concern here with these temporary loans um especially for  
17 expedited um (inaudible) for renewable too is that the process is-is moving forward a little more  
18 quickly than just a typical change of water right thing. But I think this is something we will  
19 explore with staff and we can reach out to you to see more specifically what you're thinking. I  
20 think a little more discussion on this topic might be helpful to see if there are paths forward for  
21 additional notification at a local level.

22 Ratliff: Um Jen and Linda, this is Pat Ratliff. Um some of you know I've worked for Colorado Counties  
23 for eh-25 years. They do have staff specifically assigned to water issues and water resources.

1 Certainly not at the level of expertise that CWCB has. But I would strongly encourage Callie uh  
2 and her commissioners to uh see what kinds of resources and education they can get from CCI  
3 preliminarily at least so that they actually know what questions they want to ask of uh CWCB  
4 staff and whether or not they need them for a specific meeting. Thanks.

5 Bassi: Thanks Pat.

6 Curry: Linda, can I offer a comment? This is Kathleen Curry.

7 Bassi: Yes please.

8 Curry: Before you move off this topic-So um Callie and Pat have both raised an interesting point but  
9 there's another side to this. These are private actions on the part of an individual water right  
10 holder. With the state I understand that it brings in the public side. But if there is no potential  
11 injury to a county interest um there's a certain amount of confidentiality that should be  
12 maintained. And I don't actually think a public hearing where uh people come in and comment  
13 on a private water users' decision to engage in a process like this is uh-uh-I think there's another  
14 side to this. I understand where Callie's coming from but from the water user's point of view  
15 that might be interested in doing this um then-they they might view this as a private  
16 transaction. And that uh is somewhat different in terms of heading out and-and getting public  
17 input or community input. So I just wanted to get that out there.

18 Bassi: And Kathleen, you're referring to the local meetings, not the Board public process?

19 Curry: Correct. Correct. Because if you're in a-if you're the water user, the water right holder and you  
20 want to do something with your property uh I guess I- I'm wondering why we would need a  
21 County Commissioner hearing or meeting-public meeting on a decision like that? Unless there  
22 was an impact-a negative impact potentially to water rights held by the county because as we

1 know when we negotiated this bill we kept that list of potential injury pretty tight because it was  
2 limited to decreed rights as I recall.

3 Hendrickson: And I'm sorry. I am-my conversation is prime-definitely about the new water rights. Not  
4 these loaned ones. I totally agree with you Kathleen. Respect those private property rights and  
5 that confidentiality, I -I get that. Thank you. Sorry, I didn't make that clear.

6 Bassi: So Callie, just to be clear, you're talking about new instream flow appropriations and not  
7 renewable loans of water?

8 Hendrickson: Correct. Correct.

9 Bassi: Okay. Thank you. Are there any other um comments or questions? Let's see.

10 Fleming: Linda, it's Peter.

11 Bassi: Hi, Peter. Peter, we can't hear you if you're talking.

12 Fleming: Are you able to hear me now?

13 Bassi: Yes.

14 Fleming: Okay, I'll try again. Um I had a series of questions on uh paragraph 6k. Um and I thought  
15 uh this had gotten tackled in the legislation clearly- but-um- maybe it's just my mind wrapping  
16 around it. And it has to deal with the twa-120 days in a single calendar year and the term of the  
17 uh expedited loan. So in 6k um itself um the language says expedited and renewable loans can  
18 be exercised for a period not to exceed 120 days in a single calendar year. And then 6a- -or 6 uh  
19 (1)a says an expedited loan has a term of up to one year. The loan period begins when the  
20 Engineer approves the expedited loan. I believe that intent of the statute was that um that 120  
21 days would be the total that-that the loan could be exercised and that it woul-could be only be

1 exercised only in a single calendar year not in um two calendar years not exceeding 120 days  
2 over the period of one year approval. Um do you see what I'm saying?

3 Bassi: I think so.

4 Fleming: Um and I-I just-I think that was the intent um it just seems to me that the language of  
5 the rule could benefit by clarifying that so that there was not a situation in which a um in an  
6 argument was asserted that the uh loan period for the expedited loan was a term of one year  
7 following the State Engineer approval if that occurred on uh you know July 15 of year one and  
8 the um loan was exercised for 60 days in-you-know-from July 15<sup>th</sup> through you know-the rest of  
9 that um season and then exercised again in for example June of year two for a period not to  
10 exceed 60 days. I mean-it seems unlikely but I-I don't think that was the intent so I just think  
11 there could be some clarification. Maybe I'm-I'm just uh uh reading this over-technically.

12 Bassi: We'll look at that Peter, I-I get what you're saying, um.

13 Peter: Yeah and I'm sorry and I don't have any-any language to offer at the moment but um it just  
14 seems to me that it could avoid some-something down the line, some future dispute down the  
15 line. People forget what-how that the intent of that language of the single calendar year.

16 Ratliff: Linda, you might be able to do it by just using consecutive months or consecutive days that-  
17 within one year, that would get that.

18 Bassi: I-I-I think that consecutive days would um be overly limiting because if let's say we-we start  
19 using that loaned water and then there's a huge rainstorm and we don't need it-we don't need  
20 it, a couple weeks and then we want to resume use of it when um flows decrease gain.

21 Ratliff: Yeah, you're right.

22 Fleming: Yeah, I see that point.

1 Bassi: But we'll look at that.

2 Fleming: Thank you. I had a couple more questions if-if you're so willing-um-

3 Bassi: You have the floor.

4 Fleming: Thank you in um paragraph uh 6k(1)-uh-b(ii) about the written notice.

5 Bassi: Uh-huh?

6 Fleming: Um this may-I don't know if this goes back to Michael Gustafson's comment or not. But

7 um does that written notice that's ref-uh referred to does that include-would that include the

8 documentation that's ref um to the State Engineer that's referenced in the immediately

9 preceding paragraph? In other words-you know-the-the notice that would go out would not be

10 just the fact of the proposed um expedited loan?

11 Bassi: Oh-oh...

12 Fleming: But would include documentation submitted to the

13 Bassi: It would include a copy of the application.

14 Fleming: And does that include the necessary documentation to the State Engineer as required

15 by cited statutory language? I just haven't gone back and looked.

16 Bassi: I-I'm pretty sure that it would.

17 Fleming: Okay, if-if it does it might-it might be helpful just to reference that as well and

18 parenthetically after that first clause of providing the written notice uh required by blah blah

19 blah? Including the documentation submitted to the State Engineer or something like that. Um I

20 don't know if that's critical.

21 Bassi: We'll look at that, Peter.

1 Fleming: Thank you.

2 Bassi: Um, I think we want to look back at how we did it with the 3 and 10 year loans. I think it all went  
3 out but...

4 Fleming: Yeah, I mean obviously the more information the better from the water users'  
5 perspective.

6 Bassi: Right.

7 Peter: That's all. Um next comment was in um paragraph d-below that (throat clear) excuse me um uh  
8 the language that says that CWCB's use of the loaned water for instream flows shouldn't exceed  
9 the decreed instream flow rate or beyond the instream flow reach. Um I don't have any  
10 difficulty with that obviously. But um it shoul-could that also include a clause that says  
11 something to the effect-um-is subject to the underlying terms and conditions of the existing  
12 instream flow decree. Because there may be terms and conditions in those instream flow  
13 decrees including season of use- it's not expressly mentioned here or some sort of um-you  
14 know-decree um limitation that was negotiated um it-it-that you know-wou-would still be  
15 pertinent?

16 Bassi: I-I'm not sure-we will look at that but I-I'm wondering i-if you know sometimes specific terms  
17 and conditions apply to the appropriation. I'm not sure they would always apply to acquired  
18 water, but um we will definitely look at that. And you also mentioned season?

19 Fleming: Yeah.

20 Bassi: Yeah-yeah I mean we mean for it to be within the parameters of-you know the time periods and  
21 the flow rates and the reach. And so yeah

22 Fleming: I can

1 Bassi: We can clarify that. And we'll look at the other-we'll look at the terms and conditions point you  
2 made.

3 Fleming: Uh-uh-uh That's all I have for now. Thank you.

4 Bassi: Thank you. Does anyone else have comments or questions? So um what our staff is going to um  
5 work on considering and -and incorporating input and producing an updated version of the  
6 revised rules and um we've scheduled a second stakeholder meeting in conjunction with the  
7 Summer Water Congress um that that early week. So the second meeting is going to be on  
8 August 18<sup>th</sup> from 1:00-3:00 and um we will send out a notice when we have a little more  
9 information about it and I'm sure that Doug Kemper also will be sending information out about  
10 it. Um but we'll send a notice to the instream flow subscription mailing list and a link to the  
11 latest version of the revised rules and it will also be on our website. And if anyone thinks of  
12 additional comments um please either email them to me or-or call me. Um we want to hear-  
13 hear what you have to say about the rules. Um if there's nothing else I think that's all we had  
14 and we really appreciate you taking the time to um attend this meeting and to think about these  
15 rules. And uh we'll probably see and hear from you on the 18<sup>th</sup> so thank you.

16 Fleming: Thanks.

17 Mele: Thank you.

18 Bassi: How do I stop this? (end recording)

**Chat Log C:\Users\pinelliv\Documents\ChatLog Instream Flow Rules  
2020\_08\_03 14\_17.rtf**

**Pat Ratliff (to Everyone):** 1:11 PM: 120 day limit?

**Ken Curtis (to Organizer(s) Only):** 1:27 PM: Can you give reasoning for preference of stored water over direct flow?

**Kathleen Curry (to Everyone):** 1:35 PM: Question on the hearing process when we get to section 6m. If I am understanding this, people would need to request party status to participate in the hearing. In 6.m.(5)..it may make sense to include information right in the notice itself regarding the timeframe and process for obtaining party status. ( Just so folks know that if they want to file for party status there is a time limit to do that..)

**Tyler Benton (to Organizer(s) Only):** 1:43 PM: Can you please unmute Michael Gustafson? He joined by phone and is trying to speak but cannot be heard. Thank you

**Schneider, Susan (to Everyone):** 1:44 PM: who is speaking, please?

**Colorado Water Conservation Board (to Schneider, Susan):** 1:45 PM: Michael Gustafson

**Callie Hendrickson (to Everyone):** 1:45 PM: Linda, I don't see where I can raise my hand but our county and other stakeholders feel strongly that there needs to be more notification that local water right holders would have access to.

**Tyler Benton (to Organizer(s) Only):** 1:48 PM: @Susan Schneider- Michael Gustafson, Colorado Springs City Attorney was speaking

**Callie Hendrickson (to Everyone):** 1:49 PM: Apparently my mic isnt working but How do they even know it is happening?

**Pat Ratliff (to Everyone):** 2:00 PM: have suggestion

**Callie Hendrickson (to Everyone):** 2:01 PM: My reference is to new water rights.

**Abby Burk (to Everyone):** 2:14 PM: Thank you, Linda and CWCB team



4. Stakeholder meeting 8/18/2020  
at Colorado Water Congress

## 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. Renewable loans, which can be used to preserve or improve the natural environment, 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~~ 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 prepare 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 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;
  - 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
  - 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) 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).

~~(i) At the end of or after the first ten-year period of a renewable loan, the applicant may reapply for a renewable loan, and the State Engineer may approve such loan for an additional ten-year period. At the end of or after the second ten-year period of a renewable loan, the applicant may reapply for a loan, and the State Engineer may approve such loan for one additional ten-year period 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 may shall consider hear 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.**

...

**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.**

...

**(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:

...

- (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 ~~CPW/DOW~~) 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.

...

(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 ~~CPW~~~~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) Stipulations and water court decrees that incorporate Injury with Mitigation shall include, but not be limited to inclusion of, the following terms and conditions:

...

iii. A provision allowing CWCB or ~~CPW~~~~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);

#### **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.



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## Notice of Stakeholder Meeting on ISF Rules Revisions to Implement HB20-1157

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rob.viehl@state.co.us <rob.viehl@state.co.us>

Wed, Aug 12, 2020 at 10:20 AM

To: rob.viehl@state.co.us

The CWCB staff has drafted proposed revisions to the Rules Concerning Colorado's Instream Flow and Natural Lake Level Program ("ISF Rules"). The revisions to the ISF Rules will: (1) address the rulemaking requirements of HB20-1157; (2) update a reference to the CWCB's website; and (3) update references to Colorado Parks and Wildlife.

Staff will hold its second informal stakeholder meeting on Tuesday, August 18, 2020 from 1:00 p.m. - 3:00 p.m. to discuss the draft ISF Rules revisions, which are posted on the [CWCB website](#). Staff intends to post a second draft of ISF Rules revisions by the end of this week, and invites interested parties to submit written comments on the draft ISF Rules revisions by emailing them to [linda.bassi@state.co.us](mailto:linda.bassi@state.co.us). Note that any comments received will be posted on the [CWCB website](#). At the meeting, CWCB staff and attendees will discuss the draft ISF Rules revisions, comments received, and comments expressed at the meeting. If you have questions, contact Linda Bassi at [linda.bassi@state.co.us](mailto:linda.bassi@state.co.us) or (303) 866-3441, ext. 3204.

This meeting is a pre-Colorado Water Congress Conference Workshop for which no registration is required. The Colorado Water Congress Conference kicks off on Tuesday, August 25th at 12:00 p.m.

### Meeting Details:

Tuesday, August 18, 2020 1:00 PM - 3:00 PM (MDT)

Click on the following link: <https://zoom.us/j/96023989153>. Or dial in: 669-900-6833; Webinar ID: 960-2398-9153.

4.c      Recording of Stakeholder meeting 8/18/2020  
(Provided Separately)

I, Amber Marsh, Administrative Assistant for the Natural Resources & Environment Section of the Colorado Department of Law, personally listened to the recording of this meeting that took place on August 18, 2020, and transcribed the recording of the meeting to the best of my ability, and completed the transcription on October 28, 2020.

Amber J. Marsh

1-7-21

Date

1    **Attendees for August 18, 2020 ISF Rulemaking Meeting**

2

3    Aaron Citron

4    Bill Wombacher

5    Casey Weaver

6    Daniel Spivak

7    David Rausch

8    Erich Fowler

9    Greg Peterson

10   Heather Sackett

11   Jaron Andrews

12   Jojo La

13   Jordan Sanchez

14   Juan Roberto Madrid

15   K.C. Cunilio

16   Kate Ryan

17   Kathleen Curry

18   Ken Curtis

19   Kim Ricotta

20   Lee Miller

21   Mark Ritterbush

22   Peter Fleming

23   Traci Robb

24   Katie Birch

25   Mickey O'Hara

26   Tyler Benton

27   Kerry Major

28   JNL

29   Sandra Fabritz

- 1 Pat Ratliff
- 2 Nelson Scott
- 3 Leslie Cannon
- 4 Randi Kim
- 5 Rob Harris
- 6 Rob Viehl
- 7 Roger Williams
- 8 Ryan Unterreiner
- 9



## 1 Instream Flow Stakeholder Meeting August 28, 2020

2

3 Bassi: Hello, welcome to our second instream flow rules stakeholder meeting. Please note that we're  
4 recording this meeting and we intend to provide the recording to the Board, the CWCB as part  
5 of the record in the formal rulemaking process. Our rulemaking team is here. We've got Kaylea  
6 White of CWCB staff, Jen Mele from the AG's Office and Kim Ricotta from CWCB staff and Susan  
7 Schneider who is also part of CWCB staff on a temp basis. Um I want to thank the Water  
8 Congress for hosting this meeting and setting it up for us. And thank Chane for coordinating the  
9 technical aspects of the meeting for us. Again, I'm going to ask the person with the phone  
10 number 603-320-8392 could please unmute yourself, tell us your name? We'd really appreciate  
11 it. But while-while you're figuring that out before we get started, I just want to give a few  
12 ground rules - it'd be great if you all could all keep yourself muted unless we recognize you to  
13 ask a-because you want to ask a question or provide a comment. And you can let us know you  
14 have a question or comment through the chat box, raising your hand, and if all else fails, just  
15 speak up. I would rather be interrupted than miss a question. So, just burst in if you need to. Um  
16 so we held our first stakeholder meeting on August 3<sup>rd</sup>. Are there people here who did not  
17 attend that meeting and would like us to walk through all of the proposed changes to the rule?  
18 You can raise your hand or speak up. Okay, I see one and one-one's enough. So we'll, we'll go  
19 through all the rules, but I'm also going to point out the changes that we've made since the  
20 August 3<sup>rd</sup> meeting. I will also ask at the beginning of any question or comment you give, please  
21 state your name and who you represent so that people on the phone and others can follow  
22 along. Um I just want to refresh everyone's memory about the scope of the rule revisions. The  
23 revisions to the rules will address the rulemaking requirements and implement House Bill 1157.  
24 And that that changed the temporary instream flow loan program. They'll update a reference to

1 the Colorado Water Conservation Board website and they'll update references to Colorado  
2 Parks and Wildlife in a few of the rules. So you'll see in the draft rule revisions document we've  
3 up-we've revised rule 4c to update the website reference and updated references to CPW in a  
4 few rules. And those are the only changes that staff is proposing to make to those rules. Those  
5 are the only rules we're proposing to change and we've received comments and suggestions for  
6 changes to other rules and we'll provide those comments to our Board but we're only proposing  
7 substantive revisions to rules 6k and 6m to implement House Bill 1157. To date we've received  
8 written comments from seven parties which have been posted on the CWCB website. We've  
9 received one additional comment letter since the August 3<sup>rd</sup> meeting and we've engaged in  
10 some discussions with a couple of commenting parties and at this point it doesn't look like  
11 we're going to need an additional informal stakeholder meeting but let's revisit that at the end  
12 of today's meeting. If-if people feel that another one would be helpful we'll certainly set it up.  
13 So with that I'm going to share my screen and walk through the rules. And so this is draft 2 of  
14 the proposed rules. Uh we put them on our website on Friday and sent out a notice on Monday.  
15 So on page one you'll see that in rule 4c we've updated the reference to the CWCB website. And  
16 then on page 3 there's an updated reference to Colorado Parks and Wildlife. The last time we  
17 revised the rules was in 2009 and CPW was then the Division of Wildlife. That was before the  
18 merger of Parks and Wildlife. So now we will start with rule 6k. We changed the title to add a  
19 reference to expedited and renewable loans. And so the introductory paragraph just says that  
20 that sections 37-83-105 authorizes the Board to accept and exercise two types of temporary  
21 loans; expedited and renewable. And we have a proposed change that didn't go out with draft  
22 two that came from the City of Aurora. And so I'm going to read it to you. So in the second  
23 sentence we would say that 'expedited loans have a term of up to one year and may be able to  
24 preserve the natural environment to a reasonable degree on a decreed instream flow reach.' So

1 those last few words would be added. And then in the next sentence it would say renewable  
2 loans which can be used to preserve or improve the natural environment and we would add on  
3 a decreed instream flow reach, may be exercised for up to five years in a ten year period. And  
4 for no more than three consecutive years may be renewed for up to two additional 10 year  
5 periods. So those are two changes that did not go out um with draft two but were requested in  
6 the intervening time period that we have- we're going to propose to our Board. Throughout  
7 these revised rules the word Applicant refers to the owner of a decreed water right who's  
8 offered water to the Board for an expedited or renewable loan. So rule 6k(1) addresses  
9 expedited loans and provides that an expedited loan approved to preserve the natural  
10 environment has a term of up to 1 year and there's some new language here 'with instream  
11 flow use not to exceed 120 days in a single calendar year.' We added that in response to a  
12 comment and that does come right out of the bill. So the loan period begins when the State  
13 Engineer approves the loan and if-if an expedited loan is approved the applicant may not  
14 reapply for an additional expedited loan of-of the subject water right. Um in (b) we changed the  
15 number 5 to the word five just an editorial change and so (b) provides that within five working  
16 days after receiving an offer of an expedited loan of water to the Board for temporary instream  
17 flow use, our-the CWCB Director will provide a response to the applicant. And if the proposed  
18 loan appears to be appropriate for instream flow use, staff will coordinate with the applicant um  
19 to prepare and submit the necessary documentation to the State Engineer required by the  
20 statute, and to provide the written notice required by the statute and access to all  
21 documentation provided to the State Engineer. So that is new language added, um, subsequent  
22 to the August 3<sup>rd</sup> meeting and in response to comments received. And so the um the notice has  
23 to go to all parties on the Substitute Water Supply Plan notification list for the water division  
24 where the proposed loan is located and to a registered agent of a ditch company, irrigation

1 district, water users association or other water supply or delivery entity within whose system  
2 the water rights fall. So these are specific notice requirements that were put in place by House  
3 Bill 1157-c-pr- says the provided that the State Engineer has made a determination of no injury  
4 the Board delegates authority the CWCB Director to accept expedited loans of water for  
5 instream flow use to execute an agreement for the loan of the water-that's new language since  
6 the meeting in response to a comment-and to take any administrative action necessary to put  
7 the loaned water to instream flow use. The purpose of this delegation is to expedite the Board's  
8 exercise of temporary loaned water for instream flow use under 6k(1). So the expedited loans  
9 frequently might address um an emergency situation on a stream during a drought year. And  
10 where we want to get that water in the stream and protected quickly. And this a tool by which  
11 we can do that. Rule 1k(d) provides that-that the Board's use of loaned water for instream flows  
12 shall not exceed the CWCB's decreed instream flow rates, time periods and reach at any time  
13 during the expedited loan term and shall comply with any terms and conditions imposed by the  
14 State Engineer to prevent injury. So those um specific aspects of the decreed instream flow  
15 were added in response to comments received. 6k(1)e provides that after the first regular or  
16 special Board meeting after the Director accepts or rejects over applicant's objection an offer of  
17 an expedited loan of water to the Board the Board shall e-vote to ratify or overturn the  
18 Director's decision. Um previously we had deleted the word 'rejects' and we received a  
19 comment asking why and-and what our intent by rejecting that was-excuse me-um-deleting the  
20 word rejects was that typically if we work with a water rights owner and decide that - typically  
21 mutually agreed that it's not going to work out for a temporary loan and so we don't bring those  
22 types of rejections of an offer to the Board. Um, but there could be a case where the staff and  
23 the CWCB -the Director did not think a water right was appropriate for use and the applicant  
24 disagreed, and so um that is the intent behind this language. And then Rule 6k(1)f provides that

1 the Board Director and staff will expedite all actions necessary to implement Rule 6k(1). Does  
2 anyone have any questions or comments on 6k(1)? So if not, I will proceed to 6k(2). So um 6k(2)  
3 addresses renewable loans and provides a renewable loan approved to preserve or improve the  
4 natural environment must not be exercised for more than five years in a ten year period and for  
5 no more than three consecutive years for which only a single approval by the State Engineer is  
6 required. We've added this language in response to comments 'instream flow use may not  
7 exceed 120 days in a single calendar year. The ten year period begins when the State Engineer  
8 approves the loan. And if an applicant for a renewable loan has been previously approved for an  
9 exercised-an expedited loan using the same water rights that are the subject of the pending  
10 application a one year loan period of the expedited loan counts as the first year of a five year  
11 allowance for the subsequent renewable loan. That's a very long sentence (chuckle). Um 6k(2)b  
12 provides that the Board will use a two Board meeting process to review, consider public  
13 comment, and direct staff whether to move forward with proposed renewable loans of water  
14 for instream flow use to preserve or improve the natural environment; (c) provides that any  
15 person may request the Board to hold a hearing on a proposed renewable loan. Uh the request  
16 may be submitted to the Board in writing within 20 days after the first Board meeting where the  
17 Board considers the proposed renewable loan and must include a brief statement with as much  
18 specificity as possible of why a hearing is being requested. The Board shall conduct all hearings  
19 on renewable loans pursuant to Rule 6m(5). Um 6k(2)d provides that for renewable loans to  
20 improve the natural environment to a reasonable degree the Board will request and review a  
21 biological analysis from Colorado Parks and Wildlife concerning the extent to which the  
22 proposed loan will improve the natural environment. The Board will make findings on flow rates  
23 appropriate to improve the natural environment to a reasonable degree with the loaned water  
24 and will give preference to loans of stored water when available over loans of direct flow water.

1 6k(2)e provides that when evaluating a proposed renewable loan the Board shall consider any  
2 potential injury to decreed water rights, decreed exchanges of water or other water user's  
3 undecreed existing exchanges of water to the extent that the undecreed existing exchanges  
4 have been administratively approved before the date of the Board's consideration. (f) provides  
5 that if the Board directs staff to move forward with the proposed renewable loan staff will  
6 coordinate with the applicant to prepare and submit the necessary documentation to the State  
7 Engineer required by statute to provide the written notice required by statute and access to all  
8 documentation provided to the State Engineer to those parties that I mentioned for the  
9 expedited loans - the laundry list of all the entities that should be notified. 6k(2)g is added  
10 language in response to a comment and also just to give a little more clarity to the process  
11 when the Board directs staff to move forward with a proposed renewable loan, that direction  
12 will include authorizing staff to execute an agreement for the loan of water and take any  
13 administrative action necessary to put that water to instream flow use provided that the State  
14 Engineer determines that no injury will result from the proposed loan. (h) provides that in each  
15 year the renewable loan is exercised applicant coordinating with staff if necessary shall provide  
16 the written notice required by the statute. Okay, moving on to page 7 and um we neglected to  
17 highlight some changes we made in 6k(2)i. These changes were requested by Colorado Water  
18 Trust. They brought them up at the August 3<sup>rd</sup> meeting and provided them in a letter. So the  
19 request was to use the water from the bill rather than the language we had started off with. So  
20 it now says 'the applicant may reapply for a renewable loan and the State Engineer may approve  
21 such loan for up to two additional 10 year periods. Prior to --so that's the new language that we  
22 did not highlight. Prior to any such reapplication

23 Polo: Sorry to interrupt, we have a question from one of the attendees before you go too far. I just  
24 wanted to make sure you knew.

1 Bassi: Okay: We're ready for a question.

2 Polo: Questions from Kathleen Curry. Kathleen you're muted. You just need to unmute yourself or you  
3 can type your question in the chatbox. There it goes.

4 Curry: Actually I don't have a question. So I don't know how that came up.

5 Polo: Raised, sorry I thought just thought you had a question.

6 Bassi: Shall I -shall I proceed?

7 Polo: Yes go ahead Linda. Sorry.

8 Bassi: Okay, thank you. Um so prior to any reapplication for an additional ten year period at a properly  
9 noticed public meeting staff will inform the Board about the exercise of the loan during the  
10 previous ten year period. And request approval for the loan to continue for the additional ten  
11 year period. The Board shall consider any public comment and objections to the renewal  
12 provided at the public meeting. Um th-these-this is new language we changed may to shall and  
13 we said consider and this was in response to um-to comments received. If the Board authorizes  
14 renewal of the loan, staff will coordinate with the applicant to prepare and submit the necessary  
15 documentation to the State Engineer and provide the required written notice. Um, 6k(3)  
16 provides that water rights loaned to the Board pursuant to expedited or renewable loans are  
17 not precluded from concurrent or subsequent inclusion in a water conservation, demand  
18 management, compact compliance or water banking program or plan as is or may be  
19 subsequently defined or described in statute. And that um-this rule is directly out of House Bill  
20 1157. Um I can answer or listen-or-hear any comments on Rule 6k(2) if you have some or-or I  
21 can move on? (2 second pause) So there aren't too many revisions left. I'll go through those and  
22 then we can see if anyone has any questions or comments. So, um, Rule 6m addresses public

1 input on proposed acquisitions. It's an existing rule that we use for um all instream flow  
2 acquisitions. Um we did not use it for the 3 and 10 year loans so we tweaked it a little to um a-  
3 adjust the hearing process within this rule. So it provides that the Board shall follow a public  
4 review process in Rule 11-when acquiring water-water rights or interests in water except for  
5 expedited and renewable temporary loans because those are specifically addressed in this rule.  
6 So I'm going on to page 8 and I'm going on to Rule 6m(5) and that addresses hearings on  
7 proposed acquisitions and so there are a couple places that um so in a and in c it excepts out  
8 renewable loans from the process. And then d addresses hearings on renewable loans. And that  
9 provides that um for hearings on renewable loans at least 30 days prior to the hearing date the  
10 Board shall provide written notice of the hearing to the owner of the water right to be loaned  
11 and to all the parties on the Substitute Water Supply Plan notification list where the loan is  
12 located and to the entities identified in the bill and up above. The notice will-shall include the  
13 process and deadlines for participating in the hearing. And that's added language in response to  
14 comments received. Um the-the remainder of any revisions in this document are to update  
15 references to Colorado Parks and Wildlife so I have-I have gone through all the rules that  
16 address the temporary loans. And if anyone has questions or comments this would be a great  
17 time to hear from you.

18 Polo: Looks like we have a couple of questions Linda-one from Peter Fleming I believe, and one from  
19 Bill Wombacher.

20 Linda: Okay, Peter would you like to start us off?

21 Fleming: Sure, thank, um, Linda, uh can you hear me?

22 Bassi: Yes.



1 Fleming: Okay. Um, (throat clear) uh actually I had two questions uh and one comment. The  
2 comment was uh thank you for making um changes in response to comments that were  
3 received last time. I think what you have now is an improvement because of-of those. Uh and I  
4 would say-I'll take ma-uh ask these questions in reverse order the-the ones you just talked  
5 about in um what is that subparagraph 5-6m(5) about renewal -uh ?

6 Bassi: Right here?

7 Fleming: Uh yes, except for renewable loans and for hearing on acquisitions other than  
8 renewable loans, um, this is probably my ignorance, what -um would it be helpful to specify  
9 here that these are your that the exception is for renewable loans pursuant to -I can't  
10 remember exactly what-this

11 Bassi: 37-83-105?

12 Fleming: Yeah. Um uh-in other words, loans in which you are not seeking to um change um the-  
13 the water right. Do you have under the acquisition program are you able to accept loans in-in  
14 for which there would be a change of water right and for loans you would go through the  
15 regular process-correct? Am I correct in-in that?

16 Bassi: Right. Right. For any-any loan we would need a water court proceeding?

17 Fleming: Yeah. So it would

18 Bassi: So I think adding the statutory reference here, I I think that would probably be helpful. Just to-  
19 to make it clearer.

20 Fleming: Yeah, that-I think that would cover that um question I had there. The other one-the  
21 other question I had was back on um k(1), the expedited loan section and

1 Bassi: Okay, I'm going to scroll up there I hope I'm not making everyone dizzy

2 Fleming: Yeah.

3 Bassi: Okay.

4 Fleming: It's back on k(1)a on the 120 days um issue. Thanks for making those changes uh I think  
5 that covers it for the renewable loans but concerns that I had previously expressed for the  
6 expedited loan one -I-again-this might just be my ignorance on this. I still-I'm still a little  
7 concerned or confused about um whether-because of the term of the-of the loan being a one  
8 year term that runs from the approval date of the State Engineer-you it's just not clear to me  
9 that we've um sort of closed the loop on whether the instream flow use for an expedited loan  
10 can occur during two separate calendar years so long as um the total period doesn't exceed 120  
11 days or a cer-that sort of like scenario-one. Scenario two might be the instream flow use can  
12 occur only within a single calendar year regardless of the approval date of the State Engineer,  
13 again provided that it only occurred during 120 days during that that one single calendar year.  
14 Which I think that sort of scenario two is-is sort of what the intent was of the statute. Um, but  
15 let me know if you guys think differently. And then-you know-one could even envision a reading  
16 of that language under a different scenario three that might be um you know instream flow use  
17 over two separate calendar years so long as you-you know it was all within the one year  
18 approval period and within each of those two calendar years the instream flow use- you know-  
19 could be up to 120 days, which I don't think was the intent of the statute. But um, uh regardless  
20 of how you guys interpret I just-I just think that for future clarification purposes so people don't  
21 um get confuddled with this. Wh- it could use some further clarification. And um maybe I'm just  
22 reading this too bizarrely and everybody else um it-it's clear in their minds.

1 Bassi: Well Peter, one-one scenario that I can envision from a real life example is um-a one year lease  
2 that we've entered into with an entity where we were able to use the water for instream flow  
3 use during the winter months and then also were able to use the remaining water um in the  
4 subsequent -so in the winter months of a- a-given year then we were able to use it also for a  
5 period of time during the next year. And-is that-does that scenario present um a problem? I  
6 mean-as long as –

7 Fleming: I'm not sure I'd personally care all that much. I just think it-it-it needs some clarification.  
8 Um or it would benefit from some-from some clarification so that in the future if you-you know-  
9 if there's a need to do that (throat clear) in my mind it-it shouldn't exceed a total of 120 days,  
10 although it frankly-I don't know where that 120 days figure came from and why it's critical. But,  
11 um-uhhh-that if-that if you wanted to do that-use say-you know-60 days during the winter  
12 season-you know-November and December of-of year one and in year two use another 60 days  
13 in um June and July um so long as you know-you were within the one year period of approval.  
14 Um, personally, I guess I don't know if I care that much-I just-I just can see that coming up as a -  
15 as a um point of contention and-and maybe some clarification would be helpful but I-I might  
16 have it all wrong.

17 Bassi: What-

18 Fleming: And the intent may have been um you know maybe the State Engineer approves it in  
19 November uh because he or she is not very busy and that's when the loan application came in  
20 and it's intended for use in the following um summer. That's all within the one year approval  
21 period, but it all has to happen in a single calendar year and it all and no matter what it can only  
22 you know has to be a maximum of 120 days. My-my belief is that was the-the intent of the  
23 statute um and-and sort of the most conservative read of that language but um again-I'm not-

1 that's not a battle that I'm-you know-really intending to pick at this time. I just think it's not  
2 exactly clear.

3 Bassi: Well um, one point I would make because it maybe-given that there could be different types of  
4 scenarios maybe it would be best to be addressed on a case by case basis in the State Engineer  
5 approval? Or-I mean-if-if you believe that the rule could use some clarification-you know-we're  
6 willing to look at proposed language from anyone who's interested in in um providing it to us.

7 Fleming: Yeah. So-I mean if I were to propose language that would take the most conservative  
8 approach it would be um with instream flow use not to exceed 120 days, all of which must occur  
9 within a single calendar year. Something like that. But again I-I'm not sure that's uhh y'know-I  
10 guess I would listen to others and see what their thought was on that 120 days.

11 White: Uh Linda?

12 Bassi: Yeah?

13 White: It-I-I feel like and Peter let me know if this sounds right to you but I feel like the intent was really  
14 the 12 month period. Because we have water years and fiscal years and -you have January 1<sup>st</sup> to  
15 December 31<sup>st</sup>-I feel like the intent was a twelve month period you can't use the water more  
16 than 120 days. And I get what you're saying, if we start at like the end of this year and the  
17 beginning of next year it could be interpreted to mean 120 days in each of those years, being  
18 240 days. And I don't think we've ever interpreted or-or tried to take it that far knowing the  
19 intent was probably just a 12 month period. So do you that would help if we put within a 12  
20 month period?

21 Fleming: Yeah-I mean-that would-that would um that would sort of lock it down to the one  
22 interpretation of you can use it for 120 days over a 12 month period, regardless if you-when it

1           went into uh over a calendar year. Um, but-but I think it will use that term single calendar year  
2           in the statute if I'm not mistaken.

3 Bassi:    Yeah, it's in the bill, it's expressed as a single calendar year.

4 Fleming:       Yeah, so I-I don't know uh we might have uh...

5 Bassi:    Peter, I have a question for you. I would ask um as long as the-if the State Engineer finds no  
6           injury, I guess I'm wondering why it would be necessary to limit flexibility in being able to make  
7           good use of that water as long as it's in-within the constraints of the State Engineer's approval  
8           and -and complies with any terms and conditions um set forth in that approval.

9 Fleming:       Yeah, I don't know-I mean-I can see the benefit obviously uh to using it into-you know-  
10           the next succeeding calendar year. Um, and if there's-you know-nobody objects and-there's-  
11           there's not a problem I-I-I'm not opposed to that. I guess. But-I-I suppose if you are um a  
12           concerned party that feels aggrieved you might say the intent was to limit it to one shot. It was a  
13           one time use thing. That's why it's this expedited process. It auto-you know-it-it the intent was  
14           you approve it once, you get to use it one season-you know-up to 120 days as you can pick if it's  
15           the summer or the fall the winter whenever. But-but that was the-you know-sort of the overall  
16           limitation um -eh- that was the uh quid pro quo if you will for the expedited process. I'm not  
17           arguing it one way or the other, I'm just pointing out that it's a little unclear. At least to me. Um  
18           you know maybe we need further clarification. I'd hate to do that but um uh I just-you know-  
19           maybe we can just leave it alone and you can argue it when the time comes if necessary. And y-  
20           y-you do it on an ad hoc basis, um, I-I suppose I'll-I'll take it back internally and toss it around  
21           and see what folks at the River District think if-if uh you know-if we think it's important we'll  
22           submit some written comment on it . But-but just raising it just because I think despite the um  
23           the effort at clarification, which I appreciate, I still think there's a little bit of a un-clarity about it.

1 Bassi: Okay. Thanks Peter. Yeah if-if you guys have some uh -if you go back and you come up with  
2 some proposed language, please provide it to us.

3 White: And Linda, I think some proposed language may have just come up in a chat.

4 Bassi: Which I can't see with screen sharing.

5 White: It says, let's see, uh Ken Curtis says limited to 120 days within the one-year loan term.  
6 Something like that. And-and Peter-um-it-we have a loan with River District now you might want  
7 to look at because this kind of a limitation is-it's not for our contract with River District but  
8 River's contract with others that um is kind of getting in the way of what the River District is  
9 trying to do with us. So, I don't know, I want to be a little bit careful about restricting something  
10 that is not necessarily going to be be in anybody's interest in the future, unnecessarily. I think  
11 that's what Linda's trying to be careful with you know-maybe on a case by case basis we can  
12 address it unless we come up with a 12 month scenario or like Ken Curtis said as 120 days within  
13 the one year loan term. I think at this point we're just trying to be true to the statute-and just  
14 put the words of the statute in here and not try to reinterpret. But-

15 Bassi: Now I had forgotten who else had their hand up. And Ken thank you for that suggestion. Um-  
16 Although I-I do-I think it's tricky to go-to change the language from the bill.

17 Polo: We have another hand up from Bill Wombacher.

18 Bassi: Hi Bill.

19 Wombacher: Hi, can you hear me okay?

20 Bassi: Yes.

1 Wombacher: So-one comment that we made and Linda, you and I have gone back and forth a little bit  
2 on this-I-I just wanted to get a little bit of clarification today on it. So we-we made a comment  
3 suggesting that section 6a should be revised so that it's consistent with 37-92-102(3)c.5 which is  
4 a mouthful. Um but that statutory cite is the citation that prevents the CWCB from acquiring or  
5 changing conditional water rights. And the written response that I received, um, for me it was  
6 basically there was disagreement about what that language meant and that the CWCB was even  
7 unwilling to put the precise language from the statute into the rules and so what I was just  
8 hoping to get some clarification on is the CWCB's position as to what circumstances it thinks it  
9 can acquire conditional water rights and or-or water or interest in water derived from  
10 conditional water rights? A-and whether that-they're planning to do that as part of this loan  
11 program?

12 Bassi: First-I-I would just say that um Rule 6a is-is not a rule that-that's being changed within the scope  
13 of this rulemaking. Which is why we-we um do not want to add or change any language in that  
14 rule. And we would be-I don't know- Jen if you want to jump in here that would be great but I  
15 feel like this is a discussion that might be-be better held off line with you Bill rather than go off  
16 on-on-on that that tangent within the context of discussing these rules.

17 Mele: I-I agree the language isn't relevant, I mean-you know-we don't want to make any changes to  
18 6a. Um but that language prevents CWCB from acquiring a conditional water right and not a  
19 conditional interest-you know an interest in water of a conditional water right. I think those are  
20 two separate things, they're treated separately in 37-92-102 and it doesn't feel appropriate to  
21 address them um in these rules.

22 Wombacher: So my follow up would be at the last meeting when we were discussing the changes to  
23 6k(1)e and I'm referring to the language where the term 'or rejects the loan' was eliminated, the

1 example that Linda gave about why a loan may be re-you know-my-why a loan may not be taken  
2 to the Director um even though it was offered was because it was a conditional water right. And  
3 so I guess I'm sort of hearing different things here. It seems like in certain context with respect  
4 to this loan program if it's a conditional water right that is something that is taken into  
5 consideration in this process. Umm-but-but now I'm hearing you think that this is beyond the  
6 scope of the changes. So I I-guess I'm just a little confused and trying to get some clarification  
7 because we just ultimately want to make sure that everything's consistent with the statute.

8 Bassi: And I think what I-when I offered examples last time I really meant to say on the abandonment  
9 list. And-because that is something that um we have been offered water rights that are on the  
10 abandonment list for temporary loans which we have had um to decline.

11 Wombacher: Okay, so I guess I'm not going to get any elaboration on this issue is what I'm hearing  
12 from you.

13 Bassi: I'm not-I'm not prepared to address your comment r-right at this moment Bill. And when we  
14 responded to you we said that we would-you know-we would be willing to set up a meeting  
15 with you if you want to talk about it. I-I'm just not ready to talk about that at this meeting.

16 Wombacher: Okay. Fair enough. Thank you.

17 Bassi: Are there any other um questions or comments?

18 Polo: Not seeing any comments or hands raised, Linda.

19 Bassi: So um the next steps in this process would be for staff to request authorization from the Board  
20 to start the formal rulemaking process. We're still figuring out um the timing on that. It's  
21 possible there could be a rulemaking hearing in November or January. Um if you-if you have  
22 additional comments on the revisions that you want to provide to us-we- it would be really



1 helpful if you could provide them to us by the end of August as part of the informal stakeholder  
2 process. And also just want to know if anyone feels that there is a need for an additional um  
3 informal stakeholder meeting? And again we're always um-you know-we're willing to set up  
4 individual meetings if someone wants to dig into their comments with us. But other than that-  
5 that-that's all we had today and um I want to thank you for your time and your comments.

6 Polo: Looks like we have a hand raised from Pat? Pat Ratliff.

7 Ratliff: Hi Linda and thanks for holding the meeting today and I was a little late, I apologize. Um all I'm  
8 wondering is if we can have at least notice prior to a meeting with a specific objector like-like my  
9 friend Bill um so that we could at least listen to the discussion if you had such a meeting. It  
10 confer-it concerns me that meeting only with one or two people that have a specific technical  
11 concern leaves everybody else needing to be followed up with and-and brought on line with. It  
12 seems like more trouble then it's worth to just notice a meeting and let anyone listen in that  
13 wants to. Any time Mr. Wombacher is doing things I like to be involved.

14 Bassi: I think we could do that Pat.

15 Ratliff: I don't mean to make extra work. Honest to goodness it-this meeting went really fast today so in  
16 theory we could do something in 15 minutes and I don't mind doing that. I just want the notice  
17 that's all.

18 Bassi: Understood. (pause) Does anyone have anything else for discussion today? (pause) Thank you  
19 all for your time and um please get in touch with us if-if you think of something that you didn't  
20 remember to bring up today. Appreciate you um attending.

21 Mele: Hey Linda, can I say one more thing?

22 Bassi: Yes.

1 Mele: I just want to put out there again the concept that -do we need additional stakeholder  
2 meetings? And at this point it doesn't sound like we do so I think we'll be operating under the  
3 assumption that no additional stakeholder meetings are necessary unless I guess we get a  
4 request shortly. Does that sound right to you?

5 Bassi: I think so.

6 Mele: Okay.

7 Bassi: Yes.

8 Mele: Thank you for that.

9 Bassi: Thank you. (pause) Well thank you everyone. Have a good rest of the day.

10 Fleming: Thank you.

## 5. Arkansas Basin Roundtable 8/12/2020

## **ARKANSAS BASIN ROUNDTABLE**

Website: [www.arkansasbsin.com](http://www.arkansasbsin.com)

Email: [arkbasinrt@gmail.com](mailto:arkbasinrt@gmail.com)

**Wednesday August 12, 2020**

**Start Time: 12:30 pm**

**Virtual Meeting using the following link:**

**GoToMeeting Link: <https://global.gotomeeting.com/join/631824957>**

- |                     |  |
|---------------------|--|
| <b>12:30-12:40</b>  | <b>WELCOME AND INTRODUCTIONS – Mark Shea [10 min]</b><br>Introductions<br>Approval of minutes – May 2020<br>Public Comment   |
| <b>12:40 – 1:15</b> | <b>Reports [35 min]</b><br>Executive Committee – Mark Shea (5 min)<br>CWCB Report – Sam Stein, Russ Sands, and Greg Felt (5 min)<br>IBCC Report – Jeris Danielson and Terry Scanga (5 min)<br>PEPO – Amber Weber (5 min)<br>Needs Assessment Committee – Abby Ortega (5 min)<br>Environmental and Recreational – Bob Hamel, Amber Shanklin, and Rena Griggs (5 min)<br>Arkansas River Watershed Collaborative (ARWC) – Chelsey Nutter and Mark Shea(5 min) |
| <b>1:15 – 2:00</b>  | <b>BIP Update– Mark Shea, Will Koger, Brett Gracley [45 min]</b><br>Update on Projects<br>Scope of Work Update<br>Tiered Matrix from B/C   |
| <b>2:00 – 2:45</b>  | <b>Instream Flow Rules and Revisions [45 min]</b><br>Linda Bassi   |

## **ADJOURNMENT**

### **Upcoming Meetings**

**Arkansas Basin Roundtable – August 12, 2020 (virtual)**

Subcommittees

- Enviro/Rec Comm. – August 24, 2020 @ 10:00 am

CWCB – September 16 & 17, 2020

IBCC Meeting – September 21, 2020

## **Additional GoToMeeting Information:**

**Please join my meeting from your computer, tablet or smartphone.**

<https://global.gotomeeting.com/join/631824957>

**You can also dial in using your phone.**

United States (Toll Free): [1 877 309 2073](tel:18773092073)

United States: [+1 \(571\) 317-3129](tel:+15713173129)

**Access Code:** 631-824-957

New to GoToMeeting? Get the app now and be ready when your first meeting starts:

<https://global.gotomeeting.com/install/631824957>



# Arkansas Basin Roundtable

PLANNING OUR  
WATER FUTURE

## ROUNDTABLE MEETING NOTES

August 12, 2020

GoToMeeting Link: <https://global.gotomeeting.com/join/631824957>

More information and presentations may be found at: [www.arkansasbasin.com](http://www.arkansasbasin.com)

### **Roundtable Business**

Mark Shea called the meeting to order at 12:30 pm. Members and visitors introduced themselves. Twenty five (25) members were present.

### **Approval of minutes of prior meeting**

*The meeting notes of the July 2020 meeting were approved by consensus.*

### **Public Comment - none**

### **REPORTS:**

#### **Executive Committee – Mark Shea**

The Executive Committee met this morning. Mark announced that Amber Weber has decided to step down as PEPO Coordinator. Mark thanked Amber for her work.

#### **CWCB Report – Greg Felt, Sam Stein, Russell Sands**      New website: [cwcb.colorado.gov](http://cwcb.colorado.gov)

The CWCB meets next on September 16 and 17. Public comment is being taken through the 28<sup>th</sup> regarding the demand management update. Go to: [engagewcwb.org](http://engagewcwb.org) to give feedback. There will be a virtual meeting on demand management on August 26<sup>th</sup>. There will be a CWCB board workshop on September 2<sup>nd</sup>.

Sam thanked roundtable members for their participation. CWCB is preparing to set up an all-chair meeting, which will discuss the tier matrix and CWCB criteria and guidelines.

Executive order Safer At Home has been extended. No meetings of more than 10 people. CWCB staff are working from home. Thankful for all.

Greg Felt had hoped to make some field trips by this point. He'd welcome phone calls and conversation regarding roundtable issues. His number is 719-530-1118, and email address is [gfelt@chaffeeconomy.org](mailto:gfelt@chaffeeconomy.org).

Phase 2 of the Drought Task Force has been activated by the governor. Ag Impacts Task Force is activated in this phase. The task force really wants to hear from producers that have been affected by the drought. Please go to the website to contact.

#### **IBCC Report – Jeris Danielson, Russell Sands**

The last two IBCC meetings focused almost exclusively on demand management and what equity is. September 21<sup>st</sup> will be the next meeting. Jeris expressed frustration and looks forward to discussing where the IBCC is headed at the next meeting. IBCC's role is in some ways a representative role, carrying the spirit of representation, bringing roundtable feedback back to the state.

Jeris asked Russ about what the other upper basin states are thinking about the demand management idea. If any of the other upper basin states say no, demand management won't be a solution that works. Russ reported that the other upper basin states are having similar conversations.



# Arkansas Basin Roundtable

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## PEPO – Amber Weber

- The only funding PEPO has left is the \$6,500 per year for education and outreach. The other two grants will be closed out by the end of the month. Funds remaining are for
- Amber demonstrated on the shared screen changes to the Basin Implementation Plan tab, showing how to update IPPs.
- The story map has been restructured. Go to the Ark Basin Details tab. Scroll down on the screen to reach the story map. This map is viewable by main type of project: Ag, Muni, Enviro-Rec, etc. Another map may be found under the More tab. Choose Basin Implementation Plan and scroll down to see a second story map that sorts projects by their status of: Completed, Concept, Planned or Ongoing.
- Amber welcomes project-specific photos.

## Needs Assessment – Abby Ortega

Three grants moved forward at the latest CWCB meeting. Our basin spent \$79,000 in basin funds and around 500,000 in statewide funds. Will know due dates for the next round of funding by the September meeting.

## Environment/Recreation Committee – Bob Hamel, Rena Griggs, Amber Shanklin

The Enviro/Rec Committee met on June 29<sup>th</sup>.

The committee is trying to arrange a meeting with Abby Burke. She's from a west slope roundtable and is reaching out to other enviro-rec committees around the state to discuss what other enviro/rec groups are doing. Still moving ahead with understanding what enviro/rec projects will look like in the new BIP. A lot of our projects are also ARWC projects.

Browns Canyon record of decision has been released and is available through the BLM office. VFMP has allowed for an incredibly successful season this year. Will be back to native flows after this weekend. Flows will likely be in the low 300 cfs range. Bob thanked program participants.

Rena is meeting tomorrow with Parks and Wildlife to go over the projects on their list.

Bob – After the Enviro/Rec meeting minutes went out last month Jay Winner complained that enviro-rec is only focusing on the west side of I-25. Bob wants to say that is not true and he was disappointed about this feedback. Please contact Bob, Enviro/Rec needs to hear from those that are east of I-25.

Julie Knudson described that a big part of their stream management planning is east of I25.

Mike Weber – thinks that Bob needs to come down and reach out. There is work down here. Mike mentioned the Amity project as an example.

Rena reported on the Amity project, which she found interesting, because when they were approached from the enviro side, they were hesitant to do that. But they later did make a CWCB loan app to make repairs. At that point, they left Rena out of the loop. Also, Chelsey and Amber did go down there and met with Amity. ARWC services were offered, but they never heard anything back. They got the sense that the Amity folks knew what they wanted to do and were comfortable moving forward without support. Mike thanked all for the follow-up regarding Amity.

Mark encouraged roundtable members and stakeholders to attend meetings and to ask questions and give feedback during meetings. If there are concerns, please bring them forward in a professional and courteous manner. We are trying to do the best we can.

## Arkansas River Watershed Collaborative – Chelsey Nutter



# Arkansas Basin Roundtable

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Chelsey thanked Amber for the Story Map update. She expressed her appreciation for that work. It was started by COCO, but Chelsey didn't have the capacity to move it forward. Thank you for the great relationship between ARWC and PEPO.

## Project Updates:

- We do have a grant out there that we refer to as the Science Plan. The intent is to bring together all of the water quality data out there and put it together in a way that would be searchable. We do now have a platform available to work with.
- Monarch Pass Steep Slope Mitigation Project – moving forward. Equipment is mobilizing as we speak. Working with Miller Timber and the Forest Service. Sam Ebersole will be doing some footage of the project. 2-year project.
- Hayden Pass Fire – wrapping up that project. Did a lot of work on the ground last year. Looking at longer-term recovery projects, like habitat restoration. Putting together a case study that can be used by others for post-fire recovery, possibly nationwide.
- Decker Fire – continuing to work with Chaffee County. 2 of 7 EWP projects have been completed. There are also additional projects that will be funded by CDPHE.
- Spring Fire – wrapping up modeling and engineering work. Meeting on Friday with CWCB, Huerfano County WCD and subcontractors. Try to identify projects for the next scope of work. A lot of flooding has been occurring due to this fire. Nothing that has reached town, thankfully. Have to rethink some of the projects as a result. Some areas can no longer be accessed because roads have been washed out.
- Mitigation work – Lake County will be the primary focus. Plan out mitigation projects. Projects that will work to protect critical water resources up there.
- BIP Process – Chelsey has been focusing on the BIP work, working with the committee. Started the outreach process. Looking for projects. Trying to explain to folks how to update projects and get new projects on the list.

The Executive Committee in their role as ARWC Board Members continue to discuss how to move ARWC forward and set it up for best success. Both Amber and Chelsey will stay involved in the BIP update process.

## **CWCB Instream Flow Rules and Revisions HB1157 – Linda Bassi**

Linda presented the process that CWCB is undertaking to implement HB20-1157 and discussed the rule-making process.

- CWCB Instream Flow Program was established in 1973 by state legislature.
- CWCB is the only entity in the state that can hold In-Stream Flow (ISF) water rights to preserve or improve the natural environment to a reasonable degree.
- Can appropriate and adjudicate new ISF water rights or acquire water for ISF purposes through purchase, lease or donation.
- HB20-1157 amended the statute governing temporary loans of water for instream flow use.
- CWCB will revise ISF rules to implement HB20-1157 and to make two non-substantive changes.
- Prior to HB20-1157, temporary loans were limited to ISF use for a period of 120 days, and 3 years of use over a 10-year period.
- The new bill established two types of temporary loan: expedited and renewable.
- Expedited loans may be exercised for up to one year – applicant may not apply for an additional expedited loan.





# Arkansas Basin Roundtable

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- Renewable loans may be exercised for 5 years over a 10-year period and for no more than 3 consecutive years.
- Applicants may reapply for a renewable loan for up to two additional 10-year periods.
- CWCB may use water under a renewable loan to improve the natural environment.
- CWCB is required to promulgate rules to implement the bill.
- The rule-making process is underway, and includes:
  - Informal stakeholder meetings and input
  - Public invited to submit written comments to CWCB staff
  - Staff request for CWCB board authorization to proceed to formal rulemaking
  - Rulemaking Hearing (potentially January 2021)
- Linda discussed draft proposed revisions.

## **BIP Update – Brett Gracely, Will Koger**

Brett described the Work Plan, which will be distributed to the roundtable and is not captured in its entirety here:

- Sub-committees are assisting with BIP info gathering.
- Process for collecting project data.
- Updating existing projects.
- Assimilation of new information for existing projects and 18 new projects thus far.
- Special Studies work plan allocates \$10,000 to the assessment and development of projects meeting rural community needs and \$10,000 for scoping assessments that would define future work and co-funding opportunities. Topics that might be included: updated Ag economics, enviro/rec and forest health evaluations.
- There will be a state-wide tier system that will be implemented.
- Focus now is on updating existing projects.

The Arkansas Basin has been divided into Six Sub-Regions:

1. Upper – Headwaters downstream to Chaffee-Fremont County line includes Chaffee, Custer and Lake counties.
2. Central – Fremont and Pueblo counties along the Arkansas River
3. Lower – Mainstem of Arkansas from Pueblo – Otero/Crowley county line to state line includes Bent, Crowley, Otero, and Prowers counties.
4. Northeast – Tributary watersheds north of the mainstem includes Cheyenne, Kiowa, Lincoln counties.
5. Southeast – Tributary watersheds south of the mainstem comprised of the Purgatoire and Huerfano-Cucharas basins includes Huerfano, Las Animas, and Baca counties.
6. Fountain Creek – Northern tributary watershed includes El Paso and Elbert counties.

Brett Gracely: [brett.gracely@lrewater.com](mailto:brett.gracely@lrewater.com)

Will Koger: [wkoger@forsgren.com](mailto:wkoger@forsgren.com)

Mark – the Coordinating Committee has been meeting regularly with Brett and Will. Will get a draft Work Plan out to the Roundtable for approval in September. Mike and Amber have been reaching out to folks in the Lower Basin and having conversations there. Chelsey has been doing the same in the Upper Basin. These conversations will lead into the regional workshops, which will be followed up with individual conversations as needed.



# Arkansas Basin Roundtable

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Mike and Amber have started with meeting with county commissioners. They describe the BIP as it stands, the history, the updating process, how to submit projects, the tier matrix. Ask about new projects, potential projects. Mention the regional workshops. Will be meeting with local cities next. As the canal companies have annual meetings, will attend those. Will include these counties: Otero, Prowers, Bent, Kiowa, Cheyenne, perhaps Lincoln, Pueblo, Baca. Feel free to call.

Chelsey has a similar approach. She started by identifying project proponents from the 2015 BIP and reached out to them. Sent them to the website and to the form and asked for updates. Now reaching out to county representatives, including Lake, Fremont, Custer, Chaffee, Huerfano Counties. Also reaching out to non-profits that have had projects in the past or might want to in the future. Will approach municipal entities next. Hoping that folks start their own lists that they bring to a regional workshop in order to complete.

Mark appealed to roundtable members to also be speaking with constituents and possible project proponents. Brett and Will will fill in basin areas that are not being covered by Amber, Mike or Chelsey.

Tiering Matrix: The matrix is under development. The goal is to determine which projects are ready to go, which is a statewide WIG goal.

Amber: DARCA is hosting webinars that may be of interest to RT members: <https://www.darca.org/webinars>

The meeting was adjourned at 3:06 pm.

**Admin Email: ARKBASINRT@GMAIL.COM**

**MEETINGS/LINKS: (all meetings in 2020 will be virtual)**

- Arkansas Basin Roundtable: September 9<sup>th</sup>, 12:30 pm [www.arkansasbasin.com](http://www.arkansasbasin.com)
- Enviro/Rec Committee – August 31 at 10:00 am
- CWCB Meeting: September 16 & 17
- IBCC Meeting: September 21
- PEPO: [www.pepoarkbasin.com](http://www.pepoarkbasin.com)
- Arkansas River Basin Water Forum: <http://www.arbwf.org/>
- CWCB: <http://cwcb.state.co.us/Pages/CWCBHome.aspx>
- Colorado Water Plan: <http://coloradowaterplan.com/>
- Colorado Flood Threat Bulletin: [www.coloradofloodthreat.com](http://www.coloradofloodthreat.com)
- Stream Management Plan Resource Library: <https://coloradosmp.org/>
- In-Stream Flow Rule Revisions: <https://cwcb.colorado.gov/instream-flow-rules-revisions-hb-20-1157>

# Revisions to Rules Governing Colorado's Instream Flow and Natural Lake Level Program



**August 12, 2020**

**Arkansas Basin Roundtable  
Meeting**



**COLORADO**

**Colorado Water  
Conservation Board**

Department of Natural Resources





# CWCB Instream Flow Program

- Program established in 1973 by legislature.
- CWCB is only entity in state that can hold ISF water rights to preserve or improve the natural environment to a reasonable degree.
- Can appropriate and adjudicate new ISF water rights or acquire water for ISF purposes through purchase, lease or donation.
- HB20-1157 amended statute governing temporary loans of water for instream flow use.
- CWCB will revise the ISF Rules to implement HB 1157 and to make two non-substantive changes.

# Temporary loans of water for ISF use (Section 37-83-105, C.R.S.)

- Prior to HB 1157, limited to
  - ISF use for a period of 120 days
  - 3 years of use over a 10 year period
- Can be used on any stream reach where CWCB currently holds an ISF right, up to decreed amount
- No water court change case – State and Division Engineer can approve ISF use if no injury to other water rights
- Expedited approval process



# House Bill 20-1157 (Temporary Loan Bill)

- Established two types of temporary loan: expedited and renewable.
- **Expedited** loans may be exercised for up to one year – applicant may not reapply for an additional expedited loan.
- **Renewable** loans may be exercised for 5 years over a 10-year period and for no more than 3 consecutive years.
- Applicant may reapply for a renewable loan for up to two additional 10-year periods.
- The CWCB may use water under a renewable loan to improve the natural environment.
- CWCB required to promulgate rules to implement bill.

# ISF Rules Revisions

- CWCB will revise ISF Rules to:
- Comply with and implement HB 1157, and
- Update:
  - Reference to CWCB's website
  - References to Colorado Parks & Wildlife – current rules refer to Division of Wildlife.
- ISF Rules last amended in 2009



# The Rulemaking Process

- Informal stakeholder meetings and input:
  - August 3 – approx. 60 attendees
  - August 18 from 1:00 – 3:00 in conjunction with CWC summer workshops (no charge to attend)
  - Additional meetings if needed
  - Public invited to submit written comments to staff
- Staff request for Board authorization to proceed to formal rulemaking
- Rulemaking hearing (potentially January 2021)



# Proposed Revisions to ISF Rules

Revising ISF Rule 6k. to define temporary expedited and renewable loans:

- Expedited loans may be exercised for up to one year – applicant may not reapply for an additional expedited loan.
- Renewable loans may be exercised for 5 years over a 10-year period and for no more than 3 consecutive years.
- For both types of loans, ISF use may not exceed 120 days in a single calendar year.
- The CWCB may use water under a renewable loan to improve the natural environment.

# Proposed Revisions to ISF Rule 6k.

## Expedited loans:

- Use same process and requirements as under existing law for 3 in 10 year loans, including notice to all parties on the substitute water supply plan notification list for the relevant water division, plus:
  - Notice also provided to registered agent of ditch company, irrigation district, water users' ass'n, or other water supply or delivery entity within whose system loan water rights fall; and
  - Requirement of proof that loan will not injure undecreed existing exchanges of water to extent that such exchanges were administratively approved before loan approval request filed with State Engineer.

# Proposed Revisions to ISF Rule 6k.

- Revising existing procedures to reflect HB 1157 – still using expedited procedures for:
  - evaluating and requesting approval of expedited loans, and
  - Board review and potential ratification of Director's decision on such loans.
- CWCB Director may accept and enter into an agreement for a temporary expedited loan if the State Engineer determines that no injury will result from the loan.



# Proposed Revisions to ISF Rule 6k.

## Temporary renewable loans:

- May be used to preserve or improve the natural environment
- Must not be exercised for more than 5 years in a 10-year period and for no more than 3 consecutive years, for which only a single approval by the State Engineer is required.

## Rule revisions:

- Describe notice requirements – same as for expedited loans but with 60-day period for submitting comments to State Engineer.
- Establish Board process for reviewing, receiving public input on, and directing staff on whether to move forward with a proposed renewable loan.
- Two-Board meeting process that includes a hearing, if requested.

# Proposed Revisions to ISF Rule 6k.

Revising ISF Rule 6k. to:

- Describe steps the Board must take for proposed renewable loans that would improve the natural environment to a reasonable degree, including:
  - requesting and reviewing a biological analysis from CPW on the extent to which the proposed loan will improve the natural environment to a reasonable degree; and
  - giving preference for loans of stored water, when available, over loans of direct flow water.

# Proposed Revisions to ISF Rule 6k.

- When evaluating a proposed renewable loan, Board shall consider any potential injury to:
  - decreed water rights,
  - decreed exchanges of water, or
  - other water users' undecreed existing exchanges of water to the extent that the undecreed existing exchanges have been administratively approved before the date of the Board's consideration.



# Proposed Revisions to ISF Rule 6k.

- If Board directs Staff to move forward with a proposed renewable loan, staff will coordinate with the applicant to:
  - prepare and submit the necessary documentation to the State Engineer; and
  - provide the written notice required by section 37-83-105(2)(b)(II), and access to all documentation provided to the State Engineer.
- Board also would authorize Staff to execute a renewable loan agreement and to take any administrative action necessary to put the loaned water to ISF use, provided that the State Engineer determines that no injury will result from the proposed loan.

# Proposed Revisions to ISF Rule 6k.

- Each year that a renewable loan is exercised, applicant, coordinating with CWCB Staff if necessary, shall provide the written notice required by statute.
- Applicant may reapply for two additional ten-year periods for the renewable loan.
- Prior to reapplying, 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.
- Board shall hear any public comment and objections to the renewal presented at the public meeting.



# Proposed Revisions to ISF Rule 6k.

- If the Board authorizes renewing loan, staff will coordinate with applicant to:
  - prepare and submit the necessary documentation to the State Engineer, and
  - provide the written notice required by statute.
- 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.

# Proposed Revisions to ISF Rule 6m.(5)

- Rule 6m.(5) applies to CWCB hearings on water acquisitions for ISF use – have added language to address specific notice requirements for hearings on renewable loans.
- Board will use its standard hearing process for renewable loans.
- Any person may request the Board to hold a hearing on a proposed renewable loan - request must be submitted to Board in writing within 20 days after first Board meeting at which Board considers proposed loan.
- Request must include a brief statement, with as much specificity as possible, of why a hearing is being requested.

# Questions?



**COLORADO**

Colorado Water  
Conservation Board

Department of Natural Resources

Thank you!

## 6. Board meeting July 2020



**COLORADO**

**Colorado Water  
Conservation Board**

Department of Natural Resources

Jared Polis  
Governor

Dan Gibbs  
DNR Executive Director

Rebecca Mitchell  
CWCB Director

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## July 15 & 16, 2020 Board Meeting Agenda

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A meeting of the CWCB will be held on Wednesday, July 15, 2020 commencing at 8:30 AM and continuing through Thursday, July 16, 2020. The meeting will be held virtually.

The CWCB posts notice 30 days in advance of each regularly scheduled meeting. Notices for special meetings are posted on the website typically within five business days and not less than 24 hours of such a meeting. Notices of regular and special meetings may also be received by email. To receive notices by email please visit:

<https://dwr.state.co.us/Portal/Login/>.

Although dates and times are indicated in this notice and in the following agenda, the CWCB may address and take action on noticed items in any order. Any known changes to the agenda will be announced at the beginning of the meeting. This notice, any late notice(s) of additional items, and briefing memos prepared for the CWCB will be posted at 1313 Sherman Street, Suite 721, Denver, CO 80203, and on our website at <https://cwcb.colorado.gov/>.

The CWCB meeting will be made available through live audio streaming on GoTo Webinar, although Board workshops are not. To listen to the proceedings, click the "Listen to the meeting LIVE!" link on the CWCB website homepage and select the link for the proper day and time. The link will be posted just prior to the start of the meeting.

The CWCB encourages citizens to express their views and provide feedback to the Board on the agenda items. This can be done by sending an email to [viola.bralish@state.co.us](mailto:viola.bralish@state.co.us) by sending a letter to a Board member or to the Chair of the Board, or by attending the meeting. If you want to make a public comment during the meeting you must fill out a [comment sheet](#) 5 days prior to the meeting date and email it to the [Board Coordinator](#). The Board will appreciate hearing your views when it reaches that agenda item. If you have any questions, need special accommodations as a result of a disability, or require further information on any CWCB activity, please contact Viola Bralish at 303-866-3441, ext. 3206. All programs, services, and activities of the CWCB are operated in compliance with the Federal Americans with Disabilities Act (ADA).





Wednesday, July 15, 2020	
8:30 - 8:32	<b>CWCB Call to Order and Pledge of Allegiance</b>
8:32 – 8:35	<b>1. Review and Approve Agenda</b>
8:35 – 8:37	<b>2. Review and Approve May 20, 2020 Board Meeting Minutes</b>
8:37 – 8:40	<b>3. Approve and/or Remove Consent Agenda Items</b>
8:40	<b>Board Meeting Dates in 2020</b> a. September 16 & 17 – South Platte Basin b. November 18 & 19 – Denver Metro
8:40 -9:20	<b>4. Directors' Reports</b> a. <b>DNR Executive Director</b> b. <b>CWCB Director</b> c. <b>IBCC Director</b> d. <b>Agriculture Commissioner</b> e. <b>State Engineer</b> f. <b>Division of Parks and Wildlife Director</b> g. <b>Water Resource and Power Development Authority</b>
9:20 – 9:30	<b>5. 2020 Iowa Gulch ISF Appropriation, Water Division 2 – Final Action</b> <i>Stream and Lake Protection Section</i>
9:30 - 10:00	<b>6. Proposed Revisions to Rules Concerning the Colorado Instream Flow and Natural Lake Level Program, 2 CCR 408-2</b> <i>Stream and Lake Protection Section</i>
10:00 -10:15	<b>7. Alternative Transfer Method Grant Program</b> <i>Interstate, Federal, and Water Information Section</i> a. Manassa Land and Irrigation Company, Manassa Land and Irrigation Consumptive Use Pilot b. Rio Grande Water Conservation District, Alamosa River ATM Project c. Colorado Water Trust, McKinley Ditch Deficit Irrigation Study
10:15 -10:30	<b>Morning Break</b>
10:30 -11:30	<b>8. Demand Management Update</b> <i>Interstate, Federal, and Water Information Section</i>
11:30 -11:50	<b>9. South Platte River Special Use Permit Application</b> <i>Watershed and Flood Protection Section</i>

11:50 -12:35	<b>LUNCH</b>
12:35 – 1:05	<b>10. Budget Update</b> <i>Administration &amp; Operations Section</i>
1:05 – 1:15	<b>11. Financial Matters – Construction Fund and Severance Tax Perpetual Base Fund</b> <i>Finance Section</i> Financial Projections and Cash Management Report
1:15 – 1:55	<b>12. Water Project Loans</b> <i>Finance Section</i> a. Rural Ditch Company - Diversion Structure Improvement b. Fort Morgan Farms, LLC – Delta Water Storage Phase 1 c. Amity Mutual Irrigation Company - Queen Reservoir Dam Rehabilitation
1:55 – 2:05	<b>13. Water Project Loans and Grants – This agenda item has been removed</b> <i>Finance Section</i> <del>Arkansas Groundwater Users Association—Stonewall Springs</del> <del>South Reservoir Storage Purchase</del>
2:05 – 2:15	<b>14. Changes to Existing Loans</b> <i>Finance Section</i> Grand Mesa Water Conservancy District - Peak Reservoir & Blanche Park Reservoir Rehabilitation
2:15 – 2:30	<b>15. Basin Implementation Plan and Water Plan Updates</b> <i>Water Supply Planning Section</i>

2:30 – 2:55	<b>16. WSRF Grant Applications</b> <i>Water Supply Planning Section</i>			
	<b>Water Supply Reserve Fund Application Grants at the July 2020 CWCB Board Meeting</b>			
	<b>Agenda Item</b>	<b>Basin</b>	<b>Applicant</b>	<b>Name of Water Activity</b>
	<b>a.</b>	Gunnison	Boles and Manny Ditch Company	Boles and Manny Ditch Infrastructure Improvement Project
	<b>b.</b>	Gunnison	Cedar Mesa Ditch Company	Cedar Mesa Ditch Piping Project
	<b>c.</b>	Gunnison	R & K Straheli Farms	Vouga Reservoir Rehabilitation
	<b>d.</b>	Gunnison	Trout Unlimited	Upper Gunnison Multiple Diversion Improvements
	<b>e.</b>	Southwest	Upper Road 42 Water Association	Upper Road 42 Water Line Extension Phase I – Feasibility Study
	<b>f.</b>	Yampa/White /Green	Nicholas and Ann Charchalis	Drescher Dam Rehabilitation – Engineering Design
	<b>g.</b>	Yampa/White /Green	Community Agricultural Alliance	Yampa-White-Green Education and Outreach
2:55 – 3:00	<b>17. Attorney General’s Report, Legal Briefing, and Executive Session</b>			
3:00 – 3:15	<b>Break to Transition to Executive Session</b>			
3:15 – 3:40	<b>18. Executive Session</b> a. Basin Fund MOA b. Demand Management			
3:40 – 3:45	<b>19. Report from Executive Session</b>			
3:45 – 3:50	<b>20. Water Plan Grants Overview for FY 19/20 and Recommendations for FY 20/21</b>			
3:50 – 4:50	<b>21. Water Plan Grants</b>			
	<b>Water Plan Grants</b>			
	<b>Agenda Item</b>	<b>Applicant</b>	<b>Name of Water Activity</b>	
	<b>21 a – e. Agriculture</b>			
	<b>a</b>	Cedar Mesa Ditch Company	Assistance with Piping Lower Cedar Mesa Ditch	



	<b>b</b>	Grand River Ditch Company	Davis Point Pipeline
	<b>c</b>	Lower Arkansas Valley Water Conservancy District	Soil Health Demonstration Plots
	<b>d</b>	Trout Unlimited	Applying Technology to Monitor Grass Consumptive Use at Scale
	<b>e</b>	Trout Unlimited	Upper Gunnison Multiple Diversion Improvement Project
	<b>21 f – i. Water Conservation and Land Use</b>		
	<b>f</b>	Colorado Springs Utilities	Irrigation Efficiency Improvement Project
	<b>g</b>	Peak Spatial Enterprises	Colorado's H2info Water Provider Tool – Phase 2
	<b>h</b>	Sonoran Institute	Colorado Growing Water Smart
	<b>i</b>	Year One Inc., Mile High Youth Corps	MHYC's Single Family Energy & Water Audits and Installs
	<b>21 j – t. Engagement and Innovation</b>		
	<b>j</b>	10.10.10, A Project of CO Nonprofit Development Center	Tackling Wicked Problems in Water, Climate
	<b>k</b>	Big Thompson Watershed Coalition	Building the Community – Information Connection for Watershed Health
	<b>l</b>	Coalition for the Poudre River Watershed	Engaging Stakeholders & Communities in the Poudre Through Citizen Science, Collaboration, & Outreach
	<b>m</b>	Colorado Open Lands	Education for Understanding of Critical Resource Issues
	<b>n</b>	DNR – Low Head Dam Steering Committee	Colorado Low Head Dam – Public Safety Initiative 2020
	<b>o</b>	Keystone Policy Center	For the Love of Colorado Coalition – Public Ed Initiative
	<b>p</b>	Lincoln Hills Cares	Replicable Youth-Driven Innovation Engine to Help Make the South Platte River Swimmable & Fishable
	<b>q</b>	Montezuma Land Conservancy	Montezuma Land Conservancy and Southwest Colorado Research Center
	<b>r</b>	Mountain Studies Institute	Animas River Community Forum
	<b>s</b>	National Young Farmers Coalition	Young Farmers and Ranchers Water Leadership
	<b>t</b>	Sangre de Cristo Acequia Association	Acequia Community Education and Outreach Program
	<b>21 u – kk. Environment and Recreation</b>		
	<b>u</b>	City of Alamosa	Revitalize the Rio Phase 1

	<b>v</b>	City of Englewood – Acoma	Tufts Storm Drainage Improvement Project
	<b>w</b>	Costilla County Conservancy District	Upper Culebra Watershed Assessment
	<b>x</b>	Ducks Unlimited, Inc	Rio Grande Irrigated Meadows
	<b>y</b>	Ducks Unlimited, Inc	South Platte Wetland Restorations and Planning
	<b>z</b>	Estes Valley Watershed Coalition	Upper Big Thompson Assessment, Revegetation and Bio stabilization
	<b>aa</b>	Fourmile Watershed Coalition	Tolland Ranch Feasibility Study
	<b>bb</b>	High Country Conservation Advocates (HCCA)	Wet Meadows and Riparian Restoration, Water Attenuation and Climate Change Resiliency Project
	<b>cc</b>	Montezuma County Noxious Weed Department	Phreatophyte Project
	<b>dd</b>	Mountain Studies Institute	Animas River Removal & Replacement of Invasive Phreatophytes, Phase II Continuation & Strategic Mapping
	<b>ee</b>	National Forest Institute	Taylor Park Erosion Control & Riparian Restoration Project
	<b>ff</b>	Poudre Learning Center	Phreatophyte Removal from Poudre Learning Center Riparian Habitat
	<b>gg</b>	River Network	Support to Increase Environmental and Recreational Project Proposals
	<b>hh</b>	Trout Unlimited	Canyon Creek Fish Passage Project
	<b>ii</b>	Trout Unlimited	Conejos Meadows Resilient Habitat Project
	<b>jj</b>	Windy Gap Water Activity Enterprise	Colorado River Connectivity Channel
	<b>kk</b>	Yampa Valley Stream Improvement Charitable Trust	Yampa River Habitat & Recreation Improvement Project at Pleasant Valley
	<b>21 ll - ss. Water Storage and Supply</b>		
	<b>ll</b>	Arkansas Groundwater Users Association	Stonewall Springs South Reservoir Storage Purchase
	<b>mm</b>	Blue River Valley Ranch Lakes Association	Bobo Strait Reservoir Dredging
	<b>nn</b>	Castle Rock Water	Castle Rock Reservoir No. 2

	<b>oo</b>	Cherry Creek Project Water Authority	Walker Reservoir
	<b>pp</b>	Cimarron Canal and Reservoir Company	Fish Creek Reservoir #2 Repair
	<b>qq</b>	Colorado River Water Conservation District	Crystal River Basin Augmentation Study
	<b>rr</b>	Colorado Water Protective and Development Association	Highline Recharge Pond Construction
	<b>ss</b>	Huerfano County Water Conservancy District	50% Design of Maria Stevens Reservoir Enlargement
4:50	<b>RECESS</b>		
Thursday, July 16, 2020			
8:30 – 10:00	<b>22. Basin Directors' Reports</b> <ul style="list-style-type: none"><li>a. Gunnison River Basin Director's Report</li><li>b. North Platte River Basin Director's Report</li><li>c. South Platte River Basin Director's Report</li><li>d. Arkansas River Basin Director's Report</li><li>e. City and County of Denver Director's Report</li><li>f. Rio Grande River Basin Director's Report</li><li>g. Yampa-White River Basin Director's Report</li><li>h. Colorado River (Mainstem) Basin Director's Report</li><li>i. San Juan/San Miguel-Dolores River Basin Director's Report</li></ul>		
10:00	<b>ADJOURN</b>		

## **CWCB Consent Agenda July 15 & 16, 2020**

Matters may be placed on the Consent Agenda when the recommended action follows established policy or precedent, there has been a negotiated settlement, or the matter is uncontested and non-controversial. Staff provides memos to CWCB members explaining the matters on the Consent Agenda. Matters on the Consent Agenda are noticed for hearing in the same manner as other agenda items. If a member of the CWCB requests further consideration of an item on the Consent Agenda, the item will be withdrawn from the Consent Agenda and discussed during the meeting or at the next meeting, with action taken after discussion of the item. If a member of the CWCB requests further consideration of an item on the Consent Agenda that pertains to a pending or imminent court action, the matter will be withdrawn from the Consent Agenda and may be discussed during executive session of the same meeting, and any action on that item will be taken in public session. The Consent Agenda may be voted on without reading or discussing individual items. Any CWCB member may request clarification about any matter on the Consent Agenda.

### **1. Statements of Opposition**

#### *Stream & Lake Protection Section*

*The Board will be asked to ratify Statements of Opposition that have been filed by staff to protect instream flow and natural lake level water rights and to protect CWCB's exclusive authority to hold instream flow water rights in the following water court cases:*

- a. Case No. 19CW3068 (Water Division 5): Application of Piney Valley Ranches Trust\*
- b. Case No. 20CW3013 (Water Division 4): Application of JAK Ventures, LLC

*\*Motion to Intervene & Statement of Opposition Filed.*



## COLORADO

### Colorado Water Conservation Board

Department of Natural Resources

1313 Sherman Street, Room 718  
Denver, CO 80203

P (303) 866-3441  
F (303) 866-4474

Jared Polis, Governor

Dan Gibbs, DNR Executive Director

Rebecca Mitchell, CWCB Director

**TO:** Colorado Water Conservation Board Members

**FROM:** Linda Bassi, Chief  
Kaylea White, Senior Water Resource Specialist  
Stream and Lake Protection Section

**DATE:** July 15, 2020

**AGENDA ITEM:** 6. Proposed Revisions to Rules Concerning the Colorado Instream Flow and Natural Lake Level Program, 2 CCR 408-2

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**This is an informational item with no Board action required.**

### Background

This year, the General Assembly passed and Governor Polis signed House Bill 20-1157 (HB 1157), which has an effective date of September 13, 2020. HB 1157 amends section 37-83-105, C.R.S. (2019), which governs temporary loans of water for instream flow (ISF) use. Among other things, HB 1157 directs the Board to promulgate rules to implement certain provisions of the bill. See page 6, section (VIII)(3) of HB 1157, attached to this memo. The CWCB staff is working with the Attorney General's Office on drafting revisions to the Rules Concerning the Colorado Instream Flow and Natural Lake Level Program (ISF Rules). In addition to addressing the requirements of HB 1157, the revisions also would update: (1) a reference to the CWCB's website in ISF Rule 4c.; and (2) references to Colorado Parks and Wildlife (CPW) throughout the ISF Rules, which currently refer to "the Colorado Division of Wildlife" or "DOW."

### 1. The Rulemaking Process

#### a. Meetings with Stakeholders

Rulemaking by Colorado state agencies is governed by section 24-4-103, C.R.S. (2019). Section 24-4-103(2) requires agencies contemplating rulemaking to invite a representative group of stakeholders with an interest in the subject matter of the rules to meet informally to discuss and provide input on the proposed revised rules. Staff has scheduled such a meeting on August 3, 2020 and has provided notice to persons on the ISF Subscription Mailing list, requested Colorado Water Congress to forward the notice to persons on the State Affairs Committee, and posted notice on the CWCB website. Staff is also working on scheduling another such meeting in conjunction with the Colorado Water Congress summer conference in late August. Both meetings will be held remotely.

#### b. Formal Rulemaking Process

Subsequent to holding public stakeholder meetings on proposed revised Rules, staff will request authorization from the Board to initiate the formal rulemaking process by submitting



a notice of public rulemaking hearing to the Secretary of State for publication in the Colorado Register. The notice must include: (1) the date and time of the rulemaking hearing and prehearing conference; (2) information on public participation; (3) a description of the subjects and issues involved; (4) the authority under which the rule is proposed; and (5) a copy of the proposed revised ISF Rules. The Board must hold the hearing no less than twenty days after publication of the notice. After the Board adopts the Rules, it must request an Attorney General opinion on the Rules and submit that opinion and the adopted Rules to the Secretary of State and the Office of Legislative Legal Services. After receiving approval from the Office of Legislative Legal Services, the Secretary of State will publish the Rules, which will become effective twenty days after the date of publication.

## **2. Proposed Revised Rules**

The nonsubstantive proposed revisions to the ISF Rules would update: (1) the reference to the CWCB's website in ISF Rule 4c.; and (2) references to Colorado Parks and Wildlife (CPW) throughout the ISF Rules, which currently refer to "the Colorado Division of Wildlife" or "DOW."

The remaining proposed revisions to the ISF Rules would amend ISF Rules 6k. and 6m. to implement HB 1157, and include:

- a. Definitions of expedited and renewable loans;
- b. Notice requirements for both types of loan;
- c. Procedure for evaluating and requesting approval of expedited loans, and for Board review and potential ratification of Director's decision on such loans;
- d. Board process for reviewing, receiving public input on, and directing staff on whether to move forward with a proposed renewable loan, including a hearing under ISF Rule 6m(5). if requested;
- e. Steps the Board must take for proposed renewable loans that would improve the natural environment to a reasonable degree, including: (1) requesting and reviewing a biological analysis from CPW on the extent to which the proposed loan will improve the natural environment to a reasonable degree; and (2) giving preference for loans of stored water, when available, over loans of direct flow water;
- f. Board consideration of potential injury to decreed water rights, decreed exchanges of water, or undecreed existing exchanges of water to the extent that the undecreed existing exchanges have been administratively approved before the date of the Board's consideration;
- g. Staff process for coordinating with water rights owner on requesting approval from the State Engineer of a proposed renewable loan (after Board review and decision); and
- h. Process for Board review and approval of renewing a loan for a second or third ten-year period.

Attachments:

**Exhibit 1 - House Bill 20-1157**



# An Act

HOUSE BILL 20-1157

BY REPRESENTATIVE(S) Roberts and Will, Arndt, Bird, Buentello, Cutter, Duran, Esgar, Exum, Froelich, Kennedy, Kipp, McCluskie, McKean, McLachlan, Michaelson Jenet, Sandridge, Snyder, Soper, Titone, Valdez D., Woodrow, Young, Becker;  
also SENATOR(S) Donovan, Bridges, Gonzales, Hansen, Moreno, Rodriguez, Winter, Zenzinger, Garcia.

CONCERNING THE COLORADO WATER CONSERVATION BOARD'S AUTHORITY  
TO USE WATER THAT A WATER RIGHT OWNER VOLUNTARILY LOANSTO  
THE BOARD FOR INSTREAM FLOW PURPOSES.

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

**SECTION 1.** In Colorado Revised Statutes, 37-83-105, **amend** (1), (2)(a) introductory portion, (2)(a)(IV), (2)(a)(V), (2)(b) introductory portion, (2)(b)(I) introductory portion, (2)(b)(II), (2)(b)(V), (2)(b)(VI), (2)(b)(VII), and (2)(b)(VIII); and **add** (2)(a)(III.5), (2)(a)(III.7), (2)(a)(VI), (2)(b)(II.5), and (3) as follows:

**37-83-105. Owner may loan agricultural water right - loans to Colorado water conservation board for instream flows - rules.**  
(1) (a) Subject to the limitations of this subsection (1) and pursuant to the

*Capital letters or bold & italic numbers indicate new material added to existing law; dashes through words or numbers indicate deletions from existing law and such material is not part of the act.*

Exhibit 1  
Agenda Item #6  
July 15-16, 2020

procedures set forth in ~~paragraph (b) of subsection (2)~~ SUBSECTION (2)(b) of this section THAT APPLY TO AN EXPEDITED LOAN DESCRIBED IN SUBSECTION (2)(a)(III.7) OF THIS SECTION, the owner of a water right decreed and used solely for agricultural irrigation purposes may loan all or a portion of the water right to another owner of a decreed water right on the same stream system and that is used solely for agricultural irrigation purposes for no more than one hundred eighty days during any one calendar year if the ~~division~~ STATE engineer approves ~~such~~ THE loan in advance and the loan does not cause injury to other decreed water rights.

(b) THE OWNER OF ANY DECREED WATER RIGHT MAY LOAN WATER TO THE COLORADO WATER CONSERVATION BOARD FOR USE AS INSTREAM FLOWS:

(I) TO PRESERVE THE NATURAL ENVIRONMENT TO A REASONABLE DEGREE PURSUANT TO A DECREED INSTREAM FLOW WATER RIGHT HELD BY THE BOARD; OR

(II) TO IMPROVE THE NATURAL ENVIRONMENT TO A REASONABLE DEGREE FOR A STREAM REACH FOR WHICH THE BOARD HOLDS A DECREED INSTREAM FLOW WATER RIGHT.

(2) (a) ~~A water right owner may loan water to the Colorado water conservation board for use as~~ WATER MAY BE USED FOR instream flows pursuant to a ~~decreed instream flow water right held by the board~~ LOAN AUTHORIZED UNDER THIS SECTION for a period not to exceed one hundred twenty days IN A SINGLE CALENDAR YEAR, subject to the following:

(III.5) WATER RIGHTS LOANED PURSUANT TO THIS SECTION 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.

(III.7) AN EXPEDITED LOAN APPROVED TO PRESERVE THE NATURAL ENVIRONMENT TO A REASONABLE DEGREE PURSUANT TO THIS SUBSECTION (2)(a) HAS A TERM OF UP TO ONE YEAR. THE LOAN PERIOD BEGINS WHEN THE STATE ENGINEER APPROVES THE EXPEDITED LOAN. IF AN EXPEDITED LOAN IS APPROVED, THE APPLICANT SHALL NOT REAPPLY FOR AN ADDITIONAL EXPEDITED LOAN OF THE WATER RIGHT.



(IV) (A) A RENEWABLE loan approved TO PRESERVE OR IMPROVE THE NATURAL ENVIRONMENT TO A REASONABLE DEGREE pursuant to this ~~paragraph (a) shall~~ SUBSECTION (2)(a) MUST not be exercised for more than ~~three~~ 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. The ten-year period ~~shall begin~~ BEGINS when the state engineer approves the loan. AN APPLICANT MAY REAPPLY FOR AND the state engineer ~~shall not~~ MAY approve a RENEWABLE loan pursuant to this ~~paragraph (a)~~ SUBSECTION (2)(a) for ~~another~~ UP TO TWO ADDITIONAL ten-year period; ~~except that, if the agreement has not been exercised during the term of the agreement, an applicant may reapply one time by repeating the application process pursuant to this subsection (2)~~ PERIODS.

(B) IF AN APPLICANT HAD PREVIOUSLY BEEN APPROVED FOR AND HAD EXERCISED AN EXPEDITED LOAN PURSUANT TO SUBSECTION (2)(a)(III.7) OF THIS SECTION AND SUBSEQUENTLY APPLIES AND IS APPROVED FOR A RENEWABLE LOAN, THE ONE-YEAR LOAN PERIOD OF THE EXPEDITED LOAN COUNTS AS THE FIRST YEAR OF THE FIVE-YEAR ALLOWANCE FOR THE SUBSEQUENT RENEWABLE LOAN.

(C) IN EACH YEAR THAT A RENEWABLE LOAN IS EXERCISED, THE APPLICANT SHALL PROVIDE THE WRITTEN NOTICE DESCRIBED IN SUBSECTION (2)(b)(II) OF THIS SECTION.

(V) A party may file comments concerning potential injury to ~~such~~ THE party's water rights or decreed conditional water rights due to the operations of the loan of ~~a~~ THE water right ~~to a decreed instream flow right~~ with the state engineer by January 1 of the year following each year that the loan is exercised. The procedures of ~~paragraph (b) of this subsection (2)~~ SUBSECTION (2)(b) OF THIS SECTION regarding notice, opportunity to comment, the state engineer's decision, and an appeal of ~~such~~ THE decision shall again be followed with regard to ~~such~~ THE party's comments. IN AN APPEAL TO THE WATER JUDGE IN THE APPLICABLE WATER DIVISION OF THE DETERMINATION MADE BY THE STATE ENGINEER PURSUANT TO THIS SECTION, THE APPLICANT HAS THE BURDEN OF PROOF THAT THE LOANED WATER RIGHT DOES NOT CAUSE INJURY TO OTHER VESTED OR CONDITIONALLY DECREED WATER RIGHTS. ANY APPEAL OF A DECISION BY THE STATE ENGINEER CONCERNING THE LOAN PURSUANT TO THIS SECTION SHALL BE MADE IN ACCORDANCE WITH THE PROCEDURES SET FORTH IN SUBSECTION (2)(b)(VIII) OF THIS SECTION.

(VI) RULES PROMULGATED BY THE COLORADO WATER CONSERVATION BOARD PURSUANT TO SUBSECTION (3) OF THIS SECTION.

(b) In determining whether injury will occur, the ~~division~~ STATE engineer shall ensure that the following conditions are met:

(I) The ~~proponent~~ APPLICANT has filed a request for approval of the loan with the ~~division~~ STATE engineer, together with a filing fee in the amount of ~~one~~ THREE hundred dollars. ~~Moneys from~~ THE STATE ENGINEER SHALL TRANSMIT the fee ~~shall be transmitted~~ to the state treasurer, and ~~deposited~~ WHO SHALL DEPOSIT THE FEE in the water resources cash fund created in section 37-80-111.7 (1). The request for approval ~~shall~~ MUST include:

(II) The ~~proponent~~ APPLICANT has SUBMITTED PROOF TO THE STATE ENGINEER, IN A FORM AND MANNER DETERMINED BY THE STATE ENGINEER, DEMONSTRATING THAT THE APPLICANT provided written notice of the request for approval of the loan by first-class mail or electronic mail to:

(A) 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 ~~proof of such notice is filed with the division engineer;~~

(B) 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.

(II.5) THE APPLICANT HAS PROVEN THAT THE LOAN WILL NOT INJURE DECREED WATER RIGHTS, DECREED EXCHANGES OF WATER, OR OTHER WATER USERS' UNDECREED EXISTING EXCHANGES OF WATER TO THE EXTENT THAT THE UNDECREED EXISTING EXCHANGES HAVE BEEN ADMINISTRATIVELY APPROVED BEFORE THE DATE OF THE FILING OF THE REQUEST FOR APPROVAL OF THE LOAN.

(V) The ~~division~~ STATE engineer has given the owners of water rights and decreed conditional water rights ~~fifteen days after the date of mailing of notice under subparagraph (II) of this paragraph~~ (b) THE OPPORTUNITY to file comments on the proposed loan ~~except that the division engineer may act on the application immediately after the applicant~~

~~provides evidence that all persons entitled to notice of the application under subparagraph (II) of this paragraph (b) have either consented to or commented on the application. Such~~ WITHIN THE RELEVANT TIME FRAME INDICATED IN THIS SUBSECTION (2)(b)(V). THE comments ~~shall~~ MUST include any claim of injury or any terms and conditions that should be imposed upon the proposed loan to prevent injury to a party's water ~~right~~ RIGHTS and any other information the commenting party wishes the ~~division~~ STATE engineer to consider in reviewing the proposed loan. THE STATE ENGINEER SHALL PROVIDE THE PARTIES ENTITLED TO NOTICE UNDER SUBSECTION (2)(b)(II) OF THIS SECTION:

(A) FIFTEEN DAYS AFTER THE DATE OF MAILING OF NOTICE FOR EXPEDITED LOANS AUTHORIZED UNDER SUBSECTION (2)(a)(III.7) OF THIS SECTION TO PROVIDE COMMENTS ON THE PROPOSED LOAN; AND

(B) SIXTY DAYS AFTER THE DATE OF MAILING OF NOTICE FOR RENEWABLE LOANS AUTHORIZED UNDER SUBSECTION (2)(a)(IV) OF THIS SECTION TO PROVIDE COMMENTS ON THE PROPOSED LOAN.

(VI) The ~~division~~ STATE engineer, after consideration of any comments received, has determined that the operation and administration of the proposed loan will not cause injury to other decreed water rights, DECREED EXCHANGES, OR UNDECREED EXCHANGES AS DESCRIBED IN SUBSECTION (2)(b)(II.5) OF THIS SECTION and, for loans made pursuant to ~~paragraph (a) of this subsection (2)~~ SUBSECTION (2)(a) OF THIS SECTION, will not affect Colorado's compact entitlements. The ~~division~~ STATE engineer shall impose such terms and conditions as are necessary to ensure that these standards are met. In making the determinations specified in this ~~subparagraph (VI)~~ SUBSECTION (2)(b)(VI), the ~~division~~ STATE engineer ~~shall~~ NEED not ~~be required to~~ hold any formal hearings or conduct any other formal proceedings, but may conduct a hearing or formal proceeding if the ~~division~~ STATE engineer finds it necessary to address the issues.

(VII) The ~~division~~ STATE engineer shall approve or deny the proposed loan within ~~twenty~~ TEN days after the ~~date of mailing of notice under subparagraph (II) of this paragraph (b), or within five days after the applicant provides evidence that all persons entitled to notice of the application under subparagraph (II) of this paragraph (b) have either consented to or commented on the application, whichever is earlier~~ PERIOD FOR COMMENTS ON THE PROPOSED LOAN SPECIFIED IN SUBSECTION (2)(b)(V)

OF THIS SECTION HAS EXPIRED.

(VIII) When the ~~division~~ STATE engineer approves or denies a proposed loan, the ~~division~~ STATE engineer shall serve a copy of the decision on all parties to the application by first-class mail or, if ~~such~~ THE parties have so elected, by electronic mail. Neither the approval nor the denial by the ~~division~~ STATE engineer ~~shall create~~ CREATES any presumptions ~~shift the burden of proof, or serve~~ OR SERVES as a defense in any legal action that may be initiated concerning the loan. ~~Any~~ A PARTY MAY FILE AN appeal of a decision by the ~~division~~ STATE engineer concerning the loan pursuant to this section ~~shall be made~~ to the water judge in the applicable water division within fifteen days after the date ~~on which~~ THAT THE STATE ENGINEER, FOLLOWING THE STATE ENGINEER'S CONSIDERATION OF ANY COMMENTS SUBMITTED PURSUANT TO SUBSECTION (2)(a)(V) OF THIS SECTION, SERVES the decision ~~is served~~ on the parties to the application. THE APPLICANT HAS THE BURDEN OF PROOF TO DEMONSTRATE THAT THE LOANED WATER RIGHT DOES NOT CAUSE INJURY TO OTHER VESTED OR CONDITIONALLY DECREED WATER RIGHTS, DECREED EXCHANGES, OR UNDECREED EXCHANGES AS DESCRIBED IN SUBSECTION (2)(b)(II.5) OF THIS SECTION. The water judge shall hear ~~such~~ AND DETERMINE THE appeal on an expedited basis USING THE PROCEDURES AND STANDARDS SET FORTH IN SECTION 37-92-304 (3) CONCERNING MATTERS REREFERRED TO THE WATER JUDGE BY THE WATER REFEREE.

(3) THE COLORADO WATER CONSERVATION BOARD SHALL PROMULGATE RULES REGARDING THE FOLLOWING NECESSARY STEPS FOR ITS REVIEW AND ACCEPTANCE OF LOANS FOR INSTREAM FLOW USE PURSUANT TO SUBSECTION (1)(b)(II) OF THIS SECTION:

(a) THE BOARD'S REVIEW OF THE PROPOSED LOAN, INCLUDING A REQUIREMENT THAT THE BOARD REQUEST AND REVIEW A BIOLOGICAL ANALYSIS FROM THE DIVISION OF PARKS AND WILDLIFE CONCERNING THE EXTENT TO WHICH THE PROPOSED LOAN WILL IMPROVE THE NATURAL ENVIRONMENT TO A REASONABLE DEGREE;

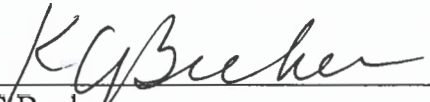
(b) A REQUIREMENT THAT WHEN CONSIDERING A PROPOSED LOAN, THE BOARD SHALL GIVE PREFERENCE TO LOANS OF STORED WATER, WHEN AVAILABLE, OVER LOANS OF DIRECT FLOW WATER; AND

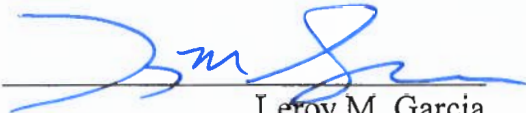
(c) THE BOARD'S DETERMINATION, AFTER A HEARING ON THE

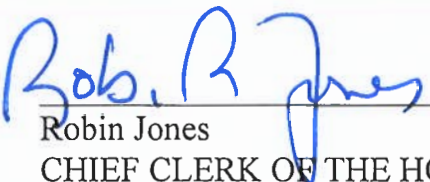
MATTER, IF REQUESTED, WHETHER TO ACCEPT THE PROPOSED LOAN.

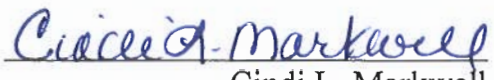
**SECTION 2. Act subject to petition - effective date - applicability.** (1) This act takes effect at 12:01 a.m. on the day following the expiration of the ninety-day period after final adjournment of the general assembly (August 5, 2020, if adjournment sine die is on May 6, 2020); except that, if a referendum petition is filed pursuant to section 1 (3) of article V of the state constitution against this act or an item, section, or part of this act within such period, then the act, item, section, or part will not take effect unless approved by the people at the general election to be held in November 2020 and, in such case, will take effect on the date of the official declaration of the vote thereon by the governor.

(2) This act applies to conduct occurring on or after the applicable effective date of this act.

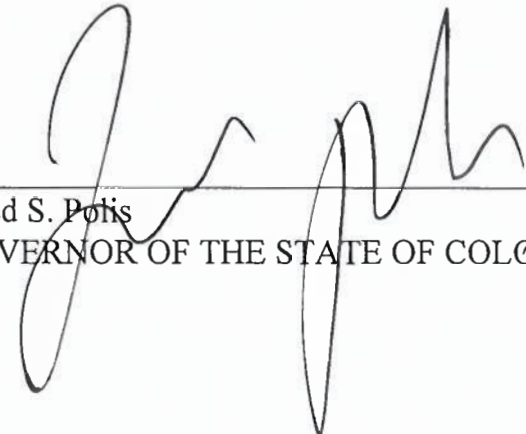
  
KC Becker  
SPEAKER OF THE HOUSE  
OF REPRESENTATIVES

  
Leroy M. Garcia  
PRESIDENT OF  
THE SENATE

  
Robin Jones  
CHIEF CLERK OF THE HOUSE  
OF REPRESENTATIVES

  
Cindi L. Markwell  
SECRETARY OF  
THE SENATE

APPROVED March 20, 2020 at 12:50 pm  
(Date and Time)

  
Jared S. Polis  
GOVERNOR OF THE STATE OF COLORADO



# Proposed Revisions to Rules Concerning the Colorado Instream Flow and Natural Lake Level Program, 2 CCR 408-2

Agenda Item 6  
July 15, 2020



**COLORADO**  
Colorado Water  
Conservation Board  
Department of Natural Resources

# Proposed ISF Rules Revisions

Drafting proposed revisions to ISF Rules that would:

- Amend ISF Rule 6 to meet requirements of and implement HB 1157 (codified at section 37-83-105, C.R.S. - temporary loans of water for ISF use)
- Revise ISF Rule 4c. to update reference to CWCB website
- Revise various ISF Rules to update references to Colorado Parks & Wildlife
- Last ISF rulemaking was in 2009.

Agenda Item 6  
July 15, 2020



**COLORADO**  
Colorado Water  
Conservation Board  
Department of Natural Resources



# The Rulemaking Process

- Informal stakeholder meetings (August 3 and Water Congress summer conference; additional meetings if needed)
- Staff request for Board authorization to proceed to formal rulemaking (potentially September or November 2020, depending on level of stakeholder input)
- Required rulemaking hearing (potentially November 2020 or January 2021)

Agenda Item 6  
July 15, 2020



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Department of Natural Resources

# Proposed Revisions to ISF Rule 6k. & 6m.

- Definitions of expedited and renewable temporary loans
- Notice requirements for each type of loan
- Expedited loans - procedure for:
  - evaluating and requesting approval of expedited loans, and
  - Board review and potential ratification of Director's decision on such loans.

Agenda Item 6  
July 15, 2020



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# Proposed Revisions to ISF Rules 6k. & 6m.

## Renewable loans:

- Board process for reviewing, receiving public input on, and directing staff whether to move forward with a proposed loan, including a hearing under Rule 6m.(5) if requested.
- Steps Board must take for proposed renewable loans that would **improve** the natural environment to a reasonable degree, including:
  - requesting and reviewing a biological analysis from CPW on the extent to which the proposed loan will improve the natural environment to a reasonable degree; and
  - giving preference to loans of stored water, when available, over loans of direct flow water.

Agenda Item 6  
July 15, 2020



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# Proposed Revisions to ISF Rule 6k.

- Board consideration of potential injury to decreed water rights, decreed exchanges of water, or undecreed existing exchanges of water to the extent that the undecreed existing exchanges have been administratively approved before the date of the Board's consideration.

Agenda Item 6  
July 15, 2020



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# Proposed Revisions to ISF Rules 6k.

- Staff process for coordinating with water rights owner on requesting approval from the State Engineer of a proposed renewable loan (after Board review and decision)
- Process for Board review and approval of renewing a loan for a second or third ten-year period

Agenda Item 6  
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# Questions?



Agenda Item 6  
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Department of Natural Resources

Jared Polis  
Governor

Dan Gibbs  
DNR Executive Director

Rebecca Mitchell  
CWCB Director

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**DRAFT**

**Summary Minutes and Record of Decisions  
July 15 & 16, 2020 Board Meeting**

A regular meeting of the Colorado Water Conservation Board (CWCB) convened virtually, the meeting was called to order by Chair Celene Hawkins. Ten voting members were present at the call to order, so a quorum was present (at least 6 required). Voting members present were: Jim Yahn, Greg Felt, Heather Dutton, Celene Hawkins, Steven Anderson, Jaclyn Brown, Gail Schwartz, Jessica Brody, and Curran Trick, and ex-officio voting member Dan Gibbs, Executive Director of the Department of Natural Resources. Non-voting ex officio members present or represented were: Phil Weiser, Attorney General, Robert Harris, Colorado Parks and Wildlife; Kate Greenberg, Department of Agriculture Commissioner; Kevin Rein, State Engineer; Russell George, Director of Compact Negotiations; and Rebecca Mitchell, Colorado Water Conservation Board Director. Counsel to the Board, Deputy Attorney General Amy Beatie, was also in attendance.

On the second day, the meeting was called to order by Chair Celene Hawkins. Nine voting members were present at the call to order, so a quorum was present (at least 6 required). The voting members present were: Jaclyn Brown, Gail Schwartz, Jessica Brody, Steven Anderson, Curran Trick, Jim Yahn, Greg Felt, Heather Dutton, and ex-officio voting member Executive Director of the Department of Natural Resources was absent. Non-voting ex officio members present or represented were: Robert Harris, Colorado Parks and Wildlife; Kevin Rein, State Engineer; Russell George, Director of Compact Negotiations; and Rebecca Mitchell, Colorado Water Conservation Board Director. Counsel to the Board, Deputy Attorney General Amy Beatie, was also in attendance.



Wednesday, July 15, 2020

<b>1</b>	<b>Review and Approve Agenda</b>
	A motion to approve the agenda was made by Jessica Brody, which was seconded by Gail Schwartz. The motion was approved unanimously (10-0).
<b>2</b>	<b>Review and Approve May 20, 2020 Board Meeting Minutes</b>
	A motion to approve the May 2020 Board minutes was made by Greg Felt, which was seconded by Jim Yahn. The motion was approved unanimously (10-0).
<b>3</b>	<b>Approve and/or Remove Consent Agenda Items</b>
	A motion to approve the Consent Agenda Items was made by Jim Yahn, which was seconded by Jackie Brown. The motion was approved unanimously (10-0).
<b>4</b>	<b>Directors' Reports</b>
4A	DNR Executive Director Dan Gibbs
4B	CWCB Director Rebecca Mitchell
4C	IBCC Director Russell George
4D	Agriculture Commissioner Kate Greenberg
4E	State Engineer Kevin Rein
4F	Division of Parks and Wildlife Director Robert Harris
4G	Water Resource and Power Development Authority Keith Laughlin
<b>5</b>	<b>2020 Iowa Gulch ISF Appropriation, Water Division 2 – Final Action</b>
	<i>Stream and Lake Protection Section</i>
	<b>Action:</b> Report by CWCB staff member Robert Viehl. A motion to approve the staff recommendation was made by Greg Felt, which was seconded by Gail Schwartz. The motion was approved unanimously (9-0).
	<b>Staff Recommendation:</b> Staff requests that the Board make the following determinations and take the following action on the Iowa Gulch appropriation identified in Table 1. The information necessary to support these determinations is contained in this memo, the recommendation letter and documentation submitted by the Bureau of Land Management (BLM), and in staff's oral and written presentations provided at the January 27, 2020 Board meeting. (1) Determine, pursuant to section 37-92-102(3), C.R.S. (2019), that for the Iowa Gulch ISF appropriation identified in Table 1: (a) There is a natural environment that can be preserved to a reasonable degree with the recommended water rights, if granted; (b) The natural environment will be preserved to a reasonable degree by the water available for the recommended appropriations; and (c) Such natural environment can exist without material injury to water rights. (2) Pursuant to ISF Rule 5f., establish January 27, 2020 as the appropriation date for this water right. (3) Accept the following terms and conditions agreed upon between Staff and the Parkville Water District as part of this final action and include the terms and conditions in the water court application and



	<p>decree for this ISF appropriation: A. The CWCB recognizes that the Iowa Ditch and the Iowa Branch of the Blow Ditch, originally decreed in Civil Action No. 1856 on September 10, 1904, with an appropriation date of July 10, 1860, of which a total of 11.737 cfs were changed to divert at the Iowa Gulch Intake in Consolidated Case Nos. 88CW58 and 95CW6 by the District Court in and for Water Division 2, are valid existing water rights that may be diverted at the Iowa Gulch Intake and are senior to the subject instream flow appropriation sought herein. 1313 Sherman Street, Room 718 Denver, CO 80203 P (303) 866-3441 F (303) 866-4474 Jared Polis, Governor Dan Gibbs, DNR Executive Director Rebecca Mitchell, CWCB Director B. If, due to naturally occurring circumstances outside the control of Parkville, changes to the natural channel of Iowa Gulch occur or repairs to the Iowa Gulch Intake or related infrastructure are needed so that it becomes necessary to move the Iowa Gulch Intake point of diversion in any direction, and such relocation is otherwise consistent with C.R.S. § 37-86-111, the instream flow appropriation sought herein shall not be relied upon in any way to prohibit or condition any such move of the point of diversion and related diversion infrastructure or to require a change of water right associated with any move of the point of diversion. (4) Agree as a condition of this ISF appropriation that that the CWCB will not require, or seek to condition any approval or consent needed by Parkville upon the requirement, though it may request Parkville's consent, that Parkville pay for or construct a measuring structure that would be used to administer the Iowa Gulch ISF water right. (5) Direct staff to request the Attorney General's office to file a water right application using the corrected legal description of the lower terminus for the appropriation and to include the terms and conditions contained in Staff's stipulation with the Parkville Water District and recited above in paragraphs (3) A and (3) B in the water court application and decree for this ISF appropriation.</p>
6	<p><b>Proposed Revisions to Rules Concerning the Colorado Instream Flow and Natural Lake Level Program, 2 CCR 408-2</b>  <i>Stream and Lake Protection Section</i></p> <p><b>Action:</b> Report by CWCB staff member Linda Bassi</p> <p><i>This is an informational item with no Board action required.</i></p>
7	<p><b>Alternative Transfer Method Grant Program</b>  <i>Interstate, Federal, and Water Information Section</i></p> <p><b>a. Manassa Land and Irrigation Company, Manassa Land and Irrigation Consumptive Use Pilot</b></p> <p><b>Action:</b> Report by CWCB staff member Alex Funk. A motion to approve the staff recommendation was made by Heather Dutton, which was seconded by Jim Yahn. The motion was approved unanimously (9-0).</p> <p><b>Staff Recommendation:</b> Staff recommends approval of up to \$40,000 from the Alternative Water Transfer Methods Program to help fund the "Manassa Land and Irrigation Co. HCU Analysis" project.</p> <p><b>b. Rio Grande Water Conservation District, Alamosa River ATM Project</b></p> <p><b>Action:</b> Report by CWCB staff member Alex Funk. A motion to approve the staff recommendation was made by Heather Dutton, which was seconded by Gail Schwartz. The motion was approved unanimously (9-0).</p>

	<p><b>Staff Recommendation:</b> Staff recommends approval of up to \$51,682 from the Alternative Water Transfer Methods Program to help fund the “Alamosa River ATM” project.</p> <p><b>c. Colorado Water Trust, McKinley Ditch Deficit Irrigation Study</b></p> <p><b>Action:</b> Report by CWCB staff member Alex Funk. A motion to approve the staff recommendation was made by Steve Anderson, which was seconded by Gail Schwartz. The motion was approved unanimously (9-0).</p> <p><b>Staff Recommendation:</b> Staff recommends approval of up to \$219,914 from the Alternative Water Transfer Methods Program to help fund the “McKinley Ditch Deficit Irrigation” project.</p>
8	<p><b>Demand Management Update</b> <i>Interstate, Federal, and Water Information Section</i></p> <p><b>Action:</b> Report by CWCB staff member Amy Ostdiek.</p> <p><i>This is an informational item with no Board action required.</i></p>
9	<p><b>South Platte River Special Use Permit Application</b> <i>Watershed and Flood Protection Section</i></p> <p><b>Action:</b> Report by CWCB staff member Rob Viehl. A motion to approve the staff recommendation was made by Jim Yahn, which was seconded by Greg Felt. The motion was approved unanimously (9-0).</p> <p><b>Staff Recommendation:</b> Staff requests board approval of the Special Use Permit to be reissued to The Pint Room with changes recommended by the State Office of Risk Management and any other requested changes by the CWCB Board.</p>
10	<p><b>Budget Update</b> <i>Administration &amp; Operations Section</i></p> <p><b>Action:</b> Report by CWCB staff member Lauren Ris</p> <p><i>This is an informational item with no Board action required.</i></p>
11	<p><b>Financial Matters – Construction Fund and Severance Tax Perpetual Base Fund</b> <i>Finance Section</i></p> <p><b>Financial Projections and Cash Management Report</b></p> <p><b>Action:</b> Report by CWCB staff member Kirk Russell.</p> <p><i>This is an informational item with no Board action required.</i></p>
12	<p><b>Water Project Loans</b> <i>Finance Section</i></p>
12A	<p><b>Rural Ditch Company – Diversion Structure Improvement</b></p> <p><b>Action:</b> Report by CWCB staff member Cole Bedford. Dan Grant with Dan Grant Bookkeeping and Garrett Varra with Rural Ditch Company addressed the Board. A motion to approve the staff recommendation was made by Jim Yahn, which was seconded by Jessica Brody. The motion was approved unanimously (9-0).</p> <p><b>Staff Recommendation:</b> Staff recommends the Board approve a loan not to exceed \$813,050 (\$805,000 for Project costs and \$8,050 for the 1% service fee) to the Rural Ditch Company for costs related to the Lateral Ditch Diversion Structure Improvement</p>

	Project, from the Severance Tax Perpetual Base Fund. The loan terms shall be 30 years at a blended interest rate of 2.70% per annum. Security for the loan shall be in compliance with CWCB Financial Policy #5.
12B	<p><b>Fort Morgan Farms, LLC – Delta Water Storage Phase 1</b></p> <p><b>Action:</b> Report by CWCB staff member Cole Bedford. Kurt Spears with and Robert Graves with Fort Morgan Farms, LLC addressed the Board. A motion to approve the staff recommendation was made by Jim Yahn, which was seconded by Steve Anderson. The motion was approved unanimously (9-0).</p> <p><b>Staff Recommendation:</b> Staff recommends the Board approve a loan not to exceed \$9,071,820 (\$8,982,000 for Project costs and \$89,820 for the 1% service fee) to Fort Morgan Farms, LLC for costs related to the Delta Water Storage Phase I Project, from the Severance Tax Perpetual Base Fund. The loan term shall be 30 years at the agricultural interest rate of 1.30% per annum. Security for the loan shall be in compliance with CWCB Financial Policy #5. Staff additionally recommends the following conditions: 1. Prior to the execution of the loan contract Fort Morgan Farms will provide a valuation of the proposed collateral to be pledged on the loan. 2. The loan contract will include a condition that Fort Morgan Farms will provide a summary, accompanying each year's annual payment, documenting the prior year's water storage and use. If the Delta Water Storage Phase I Reservoir is used for non-agricultural purposes, the CWCB will amend the contract to adjust the interest rate to the current interest rate related to the use. The duration of the loan will remain the same and a contract change fee will be assessed per Policy.</p>
12C	<p><b>Amity Mutual Irrigation Company – Queen Reservoir Dam Rehabilitation</b></p> <p><b>Action:</b> Report by CWCB staff member Rachel Pittinger. Jackie Brown disclosed that her employer has a stake in this project and she removed herself during the agenda item. Dan Steerman (Attorney), Terry Howland (Superintendent), Glenn Wilson (President), Colin Thompson (Vice President) with Amity Mutual Irrigation Company addressed the Board. A motion to approve the staff recommendation was made by Greg Felt, which was seconded by Jim Yahn. The motion was approved unanimously (8-0).</p> <p><b>Staff Recommendation:</b> Staff recommends the Board approve a loan not to exceed \$1,343,300 (\$1,330,000 for Project costs and \$13,300 for the 1% service fee) to the Amity Mutual Irrigation Company for costs related to the Queen Reservoir Dam Rehabilitation, from the Severance Perpetual Base Tax Fund. The loan term will be 30 years at a blended interest rate of 3.10% per annum with restricted reservoir rate reduction applied. Security for the loan shall be in compliance with CWCB Financial Policy #5. Additionally staff recommends the following loan contract condition: In the event Tri-State Generation and Transmission Association, Inc. pays in full their prorated shareholder ownership amount of the loan, the contract will be amended at Substantial Completion to a reduced loan amount at a 30-year interest rate of 0.80% per annum with a restricted reservoir rate reduction applied.</p>
13	<b>Removed from agenda</b>
14	<p><b>Changes to Existing Loans</b></p> <p><i>Finance Section</i></p> <p><b>Grand Mesa Water Conservancy District – Peak Reservoir &amp; Blanche Park Reservoir Rehabilitation</b></p> <p><b>Action:</b> Report by CWCB staff member Matt Stearns. Austin Keiser with Grand Mesa Water Conservancy District addressed the Board. A motion to approve the staff</p>

	<p>recommendation was made by Steve Anderson, which was seconded by Gail Schwartz. The motion was approved unanimously (9-0).</p> <p><b>Staff Recommendation:</b> Staff recommends the Board approve a second loan increase not to exceed \$163,620 (\$162,000 for Project costs and \$1,620 for the 1% service fee) to the Grand Mesa Water Conservancy District, acting by and through its water activity enterprise, for costs related to the Peak Reservoir and Blanche Park Reservoir Rehabilitation Project, from the Construction Fund. The total loan amount will become \$466,620 (\$462,000 for Project costs and \$4,620 for the 1% service fee). The loan terms shall remain 20 years at a blended interest rate of 1.55% per annum reduced due to the 20 year term. Security for the loan shall remain a pledge of water activity enterprise revenues backed by a rate covenant, in compliance with CWCB Financial Policy #5. Additionally staff recommends the contract "Term of Performance" be extended to December 31, 2022.</p>
15	<p><b>Basin Implementation Plan and Water Plan Updates</b>  <i>Water Supply Planning Section</i></p> <p><b>Action:</b> Report by CWCB staff members Russ Sands and Kathryn Weismiller.</p> <p><i>This is an informational item with no Board action required.</i></p>
16	<p><b>Water Supply Reserve Fund Grant Applications</b>  <b>Water Supply Planning Section</b></p>
16A	<p><b>Basin:</b> Gunnison  <b>Applicant:</b> Boles and Manny Ditch Company  <b>Name of Water Activity:</b> Boles and Manny Ditch Infrastructure Improvement Project</p> <p><b>Action:</b> Report by CWCB staff member Craig Godbout. A motion to approve the staff recommendation was made by Steve Anderson, which was seconded by Jim Yahn. The motion was approved unanimously (9-0).</p> <p><b>Staff Recommendation:</b> Staff recommends approval of up to \$33,500 from the Gunnison Basin Account to help fund the project titled: Boles and Manny Ditch Infrastructure Improvement Project.</p>
16B	<p><b>Basin:</b> Gunnison  <b>Applicant:</b> Cedar Mesa Ditch Company  <b>Name of Water Activity:</b> Cedar Mesa Ditch Piping Project</p> <p><b>Action:</b> Report by CWCB staff member Craig Godbout. A motion to approve the staff recommendation was made by Steve Anderson, which was seconded by Greg Felt. The motion was approved unanimously (9-0).</p> <p><b>Staff Recommendation:</b> Staff recommends approval of up to \$54,800 from the Gunnison Basin Account to help fund the project titled: Cedar Mesa Ditch Piping Project.</p>
16C	<p><b>Basin:</b> Gunnison  <b>Applicant:</b> R &amp; K Straheli Farms  <b>Name of Water Activity:</b> Vouga Reservoir Rehabilitation</p> <p><b>Action:</b> Report by CWCB staff member Craig Godbout. A motion to approve the staff recommendation was made by Steve Anderson, which was seconded by . The motion was approved unanimously (9-0).</p> <p><b>Staff Recommendation:</b> Staff recommends approval of up to \$50,000 from the Gunnison Basin Account to help fund the project titled: Vouga Reservoir Repair.</p>

16D	<p><b>Basin:</b> Gunnison  <b>Applicant:</b> Trout Unlimited  <b>Name of Water Activity:</b> Upper Gunnison Multiple Diversion Improvements</p> <p><b>Action:</b> Report by CWCB staff member Craig Godbout. A motion to approve the staff recommendation was made by Steve Anderson, which was seconded by Gail Schwartz. The motion was approved unanimously (9-0).</p> <p><b>Staff Recommendation:</b> Staff recommends approval of up to \$19,000 from the Gunnison Basin Account to help fund the project titled: Upper Gunnison Multiple Diversion Improvement Project.</p>
16E	<p><b>Basin:</b> Southwest  <b>Applicant:</b> Upper Road 42 Water Association  <b>Name of Water Activity:</b> Upper Road 42 Water Line Extension Phase I – Feasibility Study</p> <p><b>Action:</b> Report by CWCB staff member Craig Godbout. A motion to approve the staff recommendation was made by Jim Yahn, which was seconded by Steve Anderson. The motion was approved unanimously (9-0).</p> <p><b>Staff Recommendation:</b> Staff recommends approval of up to \$22,260 from the Southwest Basin Account to help fund the project: Upper Road 42 Water Extension Phase I – Feasibility Study</p>
16F	<p><b>Basin:</b> Yampa/White/Green  <b>Applicant:</b> Nicholas and Ann Charchalis  <b>Name of Water Activity:</b> Drescher Dam Rehabilitation – Engineering Design</p> <p><b>Action:</b> Report by CWCB staff member Craig Godbout. A motion to approve the staff recommendation was made by Jaclyn Brown, which was seconded by Jim Yahn. The motion was approved unanimously (9-0).</p> <p><b>Staff Recommendation:</b> Staff recommends approval of up to \$10,000 from the Yampa/White/Green Basin Account to help fund the project titled: Drescher Dam Rehabilitation – Engineering Design.</p>
16G	<p><b>Basin:</b> Yampa/White/Green  <b>Applicant:</b> Community Agricultural Alliance  <b>Name of Water Activity:</b> Yampa-White-Green Education and Outreach</p> <p><b>Action:</b> Report by CWCB staff member Craig Godbout. A motion to approve the staff recommendation was made by Jaclyn Brown, which was seconded by Gail Schwartz. The motion was approved unanimously (9-0).</p> <p><b>Staff Recommendation:</b> Staff recommends approval of up to \$99,000 from the Yampa/White/Green Basin Account to help fund the project titled: Yampa-White-Green Education and Outreach.</p>
17	<p><b>Attorney General’s Report, Legal Briefing, and Executive Session</b></p> <p><b>Action:</b> Report by Counsel to the Board, Deputy Attorney General Amy Beatie. A motion to go into Executive Session was made by Jessica Brody, which was seconded by Steve Anderson. The motion was approved unanimously (9-0).</p>
18	<b>Executive Session</b>
18A	Basin Fund MOA
18B	Demand Management
18C	ISF Rulemaking – added at the beginning of the meeting

19	<p><b>Report from Executive Session</b></p> <p><b>Action:</b> Report by Counsel to the Board, Deputy Attorney General Amy Beatie. A motion to go out of Executive Session was made by Jessica Brody, which was seconded by Greg Felt. The motion was approved unanimously (9-0)</p>
20	<p><b>Water Plan Grants Overview for FY 19/20 and Recommendations for FY 20/21</b></p> <p><b>Action:</b> Report by CWCB staff member Lauren Ris. A motion to approve the staff recommendation was made by Jim Yahn, which was seconded by Greg Felt. The motion was approved unanimously (9-0).</p> <p><b>Staff Recommendation:</b> Staff recommends the Board approve amending the Water Plan Grants Criteria and Guidelines (attached) to bring grant recommendations to the March 2020 Board meeting to accommodate a single grant application deadline of December 1, 2020.</p>
21	<p><b>Water Plan Grants</b></p>
21 a-e	<p><b>Agriculture</b></p> <p><b>Action:</b> Report by CWCB staff member Alex Funk. A motion to approve the staff recommendations was made by Jim Yahn, which was seconded by Steve Anderson. The motion was approved unanimously (9-0).</p> <p><b>Staff Recommendation:</b> Staff recommends the following Board action for activities listed in the following table regarding Colorado's Water Plan Grant Program funding. Project approval is contingent on awardees implementing the project consistent with any public health orders and executive orders in the effect at the time of implementation.</p> <p>a. Cedar Mesa Ditch Company Assistance with Piping Lower Cedar Mesa Ditch \$35,000 Approve \$35,000</p> <p>b. Grand River Ditch Company Davis Point Pipeline \$62,500 Approve \$62,500</p> <p>c. Lower Arkansas Valley Water Conservancy District Soil Health Demonstration Plots \$100,000 Approve \$100,000</p> <p>d. Trout Unlimited Applying Technology to Monitor Grass Consumptive Use at Scale \$29,394 Approve \$29,394</p> <p>e. Trout Unlimited Upper Gunnison Multiple Diversion Improvement Project \$52,731 Approve \$52,731</p> <p>Total Recommended for Approval \$279,625</p>
21a	<p><b>Applicant:</b> Cedar Mesa Ditch Company</p> <p><b>Name of Water Activity:</b> Assistance with Piping Lower Cedar Mesa Ditch</p> <p><b>Staff Recommendation:</b> Staff recommends Board approval of \$35,000.</p>
21b	<p><b>Applicant:</b> Grand River Ditch Company</p> <p><b>Name of Water Activity:</b> Davis Point Pipeline</p> <p><b>Staff Recommendation:</b> Staff recommends Board approval of \$62,500</p>
21c	<p><b>Applicant:</b> Lower Arkansas Valley Water Conservancy District</p> <p><b>Name of Water Activity:</b> Soil Health Demonstration Plots</p> <p><b>Staff Recommendation:</b> Staff recommends Board approval of \$100,000</p>
21d	<p><b>Applicant:</b> Trout Unlimited</p> <p><b>Name of Water Activity:</b> Applying Technology to Monitor Grass Consumptive Use at Scale</p>

	<b>Staff Recommendation:</b> Staff recommends Board approval of \$29,394
<b>21e</b>	<b>Applicant:</b> Trout Unlimited <b>Name of Water Activity:</b> Upper Gunnison Multiple Diversion Improvement Project  <b>Staff Recommendation:</b> Staff recommends Board approval of \$52,731.
<b>21f-i</b>	<b>Water Conservation and Land Use</b>  <b>Action:</b> Report by CWCB staff member Kevin Reidy. A motion to approve the staff recommendation was made by Jessica Brody, which was seconded by Greg Felt. The motion was approved unanimously (9-0).  <b>Staff Recommendation:</b> Staff recommends that the Board approve the projects/activities marked as “Approve” and listed in the following table for Water Plan Grant funding. Project approval is contingent on awardees implementing the project consistent with any public health orders and executive orders in effect at the time of implementation. f. Colorado Springs Utilities Irrigation Efficiency Improvement Project \$70,000 Approve \$70,000 g. Peak Spatial Colorado’s H2info Water Provider Tool – Phase 2 \$42,500 Approve \$42,500 h. Sonoran Institute Colorado Growing Water Smart \$396,673 Approve \$396,673 i. Year One, inc. Mile High Youth Corps MHYC’s Single Family Energy & Water Audits and Installs \$203,548.77 Approve \$203,548.77 Total Recommended for Approval \$712,721.77
<b>21f</b>	<b>Applicant:</b> Colorado Springs Utilities <b>Name of Water Activity:</b> Irrigation Efficiency Improvement Project  <b>Staff Recommendation:</b> Staff recommends approval of up to \$70,000
<b>21g</b>	<b>Applicant:</b> Peak Spatial <b>Name of Water Activity:</b> Colorado’s H2info Water Provider Tool – Phase 2  <b>Staff Recommendation:</b> Staff recommends approval of up to \$42,500
<b>21h</b>	<b>Applicant:</b> Sonoran Institute <b>Name of Water Activity:</b> Colorado Growing Water Smart  <b>Staff Recommendation:</b> Staff recommends approval of up to \$396,673
<b>21i</b>	<b>Applicant:</b> Year One, inc. <b>Name of Water Activity:</b> Mile High Youth Corps MHYC’s Single Family Energy & Water Audits and Installs  <b>Staff Recommendation:</b> Staff recommends approval of up to \$203,548.77
<b>21 j-t</b>	<b>Engagement and Innovation</b>  <b>Action:</b> Report by CWCB staff member Ben Wade. A motion to approve the staff recommendations was made by Jessica Brody, which was seconded by Steve Anderson. The motion was approved unanimously (9-0).  <b>Staff Recommendation:</b> Staff recommends the following Board action for activities listed in the following table regarding Colorado’s Water Plan Grant Program funding. Project approval is contingent on awardees implementing the project consistent with any public health orders and executive orders in effect at the time of implementation. j. 10.10.10 A Project of CO Nonprofit Development Center* Tackling Wicked Problems in Water + Climate \$82,790 Not Recommended

	<p>k. Big Thompson Watershed Coalition Building the Community – Information Connection for Watershed Health \$48,871.60 Approve \$30,163.60</p> <p>l. Coalition for the Poudre River Watershed* Engaging Stakeholders &amp; Communities in the Poudre through Citizen Science, Collaboration &amp; Outreach \$18,425 Approve \$13,425</p> <p>m. Colorado Open Lands Education for Understanding of Critical Resource Issues \$43,000 Approve \$43,000</p> <p>n. Department of Natural Resources – Low Head Dam Steering Committee Colorado Low Head Dam – Public Safety Initiative 2020 \$35,000 Approve \$31,250</p> <p>o. Keystone Policy Center* For the Love of Colorado Public Education Initiative Withdrawn Not Recommended</p> <p>p. Lincoln Hills Cares* Replicable Youth Driven Innovation Engine to Help the South Platte River Swimmable &amp; Fishable \$43,340 Approve \$28,893</p> <p>q. Montezuma Land Conservancy Montezuma Land Conservancy and Southwest Colorado Research Center \$77,321 Approve \$63,380.50</p> <p>r. Mountain Studies Institute Animas River Community Forum \$27,586.50 Approve \$26,473.50</p> <p>s. National Young Farmers Coalition* Young Farmers and Ranchers Water Leadership Pilot Program \$25,000 Approve \$21,275</p> <p>t. Sangre de Cristo Acequia Association Acequia Community Education &amp; Outreach Program \$22,500 Approve \$15,500</p> <p>Total Recommended for Approval \$273,361</p>
21j	<p><b>Applicant:</b> 10.10.10</p> <p><b>Name of Water Activity:</b> A Project of CO Nonprofit Development Center* Tackling Wicked Problems in Water + Climate</p> <p><b>Staff Recommendation:</b> Not Recommended</p>
21k	<p><b>Applicant:</b> Big Thompson Watershed Coalition</p> <p><b>Name of Water Activity:</b> Building the Community – Information Connection for Watershed Health</p> <p><b>Staff Recommendation:</b> Staff recommends approval of up to \$30,163.60</p>
21l	<p><b>Applicant:</b> Coalition for the Poudre River Watershed</p> <p><b>Name of Water Activity:</b> Engaging Stakeholders &amp; Communities in the Poudre through Citizen Science, Collaboration &amp; Outreach</p> <p><b>Staff Recommendation:</b> Staff recommends approval of up to \$13,425</p>
21m	<p><b>Applicant:</b> Colorado Open Lands</p> <p><b>Name of Water Activity:</b> Education for Understanding of Critical Resource Issues</p> <p><b>Staff Recommendation:</b> Staff recommends approval of up to \$43,000</p>
21n	<p><b>Applicant:</b> Department of Natural Resources</p> <p><b>Name of Water Activity:</b> Low Head Dam Steering Committee Colorado Low Head Dam – Public Safety Initiative 2020</p> <p><b>Staff Recommendation:</b> Staff recommends approval of up to \$31,250</p>
21o	<p><b>Applicant:</b> Keystone Policy Center</p> <p><b>Name of Water Activity:</b> For the Love of Colorado Public Education Initiative Withdrawn</p> <p><b>Staff Recommendation:</b> Not Recommended</p>
21p	<p><b>Applicant:</b> Lincoln Hills Cares</p> <p><b>Name of Water Activity:</b> Replicable Youth Driven Innovation Engine to Help the South Platte River Swimmable &amp; Fishable</p>



	<b>Staff Recommendation:</b> Staff recommends approval of up to \$28,893
<b>21q</b>	<b>Applicant:</b> Montezuma Land Conservancy <b>Name of Water Activity:</b> Montezuma Land Conservancy and Southwest Colorado Research Center  <b>Staff Recommendation:</b> Staff recommends approval of up to \$63,380.50
<b>21r</b>	<b>Applicant:</b> Mountain Studies Institute <b>Name of Water Activity:</b> Animas River Community Forum  <b>Staff Recommendation:</b> Staff recommends approval of up to \$26,473.50
<b>21s</b>	<b>Applicant:</b> National Young Farmers Coalition <b>Name of Water Activity:</b> Young Farmers and Ranchers Water Leadership Pilot Program  <b>Staff Recommendation:</b> Staff recommends approval of up to \$21,275
<b>21t</b>	<b>Applicant:</b> . Sangre de Cristo Acequia Association <b>Name of Water Activity:</b> Acequia Community Education & Outreach Program  <b>Staff Recommendation:</b> Staff recommends approval of up to \$15,500
<b>21 u – kk</b>	<b>Environment and Recreation</b>  <b>Action:</b> Report by CWCB staff member Andrea Harbin Monahan. A motion to approve the staff recommendations was made by Heather Dutton, which was seconded by Greg Felt. The motion was approved unanimously (9-0).  <b>Staff Recommendation:</b> Staff recommends the following Board actions for activities listed in the following table regarding Colorado's Water Plan Grant Program funding. Project approval is contingent on awardees implementing the projects consistent with any public health orders and executive orders in effect at the time of implementation. <ul style="list-style-type: none"> <li>u. City of Alamosa Revitalize the Rio Phase I \$55,160 Approve \$55,160</li> <li>v. City of Englewood Acoma-Tufts Storm Drainage Improvement Project \$397,000 Not Recommended</li> <li>w. Costilla County Conservancy District Upper Culebra Watershed Assessment \$177,224 Not Recommended</li> <li>x. Ducks Unlimited, Inc. Rio Grande Irrigated Meadows \$400,000 Not Recommended</li> <li>y. Ducks Unlimited, Inc. South Platte Wetland Restorations and Planning \$141,976 Not Recommended</li> <li>z. Estes Valley Watershed Coalition Upper Big Thompson Assessment, Re-vegetation, and Biostabilization \$19,205 Approve \$19,205</li> <li>aa. Fourmile Watershed Coalition Tolland Ranch Feasibility Study \$30,321 Approve \$30,321</li> <li>bb. High Country Conservation Advocates Wet Meadows and Riparian Restoration \$49,000 Approve \$49,000</li> <li>cc. Montezuma County Noxious Weed Department Phreatophyte Project \$125,000 Approve \$62,500</li> <li>dd. Mountain Studies Institute Animas River Removal &amp; Replacement of Invasive Phreatophytes, Phase II \$59,299 Approve \$59,299</li> <li>ee. National Forest Institute Taylor Park Erosion Control &amp; Riparian Restoration Project \$30,000 Approve \$30,000</li> <li>ff. Poudre Learning Center Phreatophyte Removal from Riparian Habitat \$26,814 Approve \$26,814</li> <li>gg. River Network Support to Increase Environmental &amp; Recreational Project Proposals \$98,973 Not Recommended</li> </ul>

	hh. Trout Unlimited Canyon Creek Fish Passage Project \$101,812 Approve \$101,812 ii. Trout Unlimited Conejos Meadows Resilient Habitat Project \$108,594 Approve \$108,594 jj. Windy Gap Water Activity Enterprise Colorado River Connectivity Channel \$2,400,000 Approve \$735,213 kk. Yampa Valley Stream Improvement Charitable Trust Yampa River Habitat & Recreation Improvement Project at Pleasant Valley \$117,990 Approve \$117,990 Total \$4,338,368 \$1,395,908
21u	<b>Applicant:</b> City of Alamosa <b>Name of Water Activity:</b> Revitalize the Rio Phase I  <b>Staff Recommendation:</b> Staff recommends approval of up to \$55,160
21v	<b>Applicant:</b> City of Englewood Acoma <b>Name of Water Activity:</b> Tufts Storm Drainage Improvement Project  <b>Staff Recommendation:</b> Not Recommended
21w	<b>Applicant:</b> Costilla County Conservancy District <b>Name of Water Activity:</b> Upper Culebra Watershed Assessment  <b>Staff Recommendation:</b> Not Recommended
21x	<b>Applicant:</b> Ducks Unlimited, Inc. Rio Grande Irrigated Meadows <b>Name of Water Activity:</b> Rio Grande Irrigated Meadows  <b>Staff Recommendation:</b> Not Recommended
21y	<b>Applicant:</b> Ducks Unlimited, Inc. <b>Name of Water Activity:</b> South Platte Wetland Restorations and Planning  <b>Staff Recommendation:</b> Not Recommended
21z	<b>Applicant:</b> Estes Valley Watershed Coalition Upper Big Thompson Assessment <b>Name of Water Activity:</b> Re-vegetation, and Biostabilization  <b>Staff Recommendation:</b> Staff recommends approval of up to \$19,205
21aa	<b>Applicant:</b> Fourmile Watershed Coalition <b>Name of Water Activity:</b> Tolland Ranch Feasibility Study  <b>Staff Recommendation:</b> Staff recommends approval of up to \$30,321
21bb	<b>Applicant:</b> High Country Conservation Advocates <b>Name of Water Activity:</b> Wet Meadows and Riparian Restoration  <b>Staff Recommendation:</b> Staff recommends approval of up to \$49,000
21cc	<b>Applicant:</b> Montezuma County <b>Name of Water Activity:</b> Noxious Weed Department Phreatophyte Project  <b>Staff Recommendation:</b> Staff recommends approval of up to \$62,500
21dd	<b>Applicant:</b> Mountain Studies Institute <b>Name of Water Activity:</b> Animas River Removal & Replacement of Invasive Phreatophytes, Phase II  <b>Staff Recommendation:</b> Staff recommends approval of up to \$59,299
21ee	<b>Applicant:</b> National Forest Institute <b>Name of Water Activity:</b> Taylor Park Erosion Control & Riparian Restoration Project  <b>Staff Recommendation:</b> Staff recommends approval of up to \$30,000

<b>21ff</b>	<p><b>Applicant:</b> Poudre Learning Center  <b>Name of Water Activity:</b> Phreatophyte Removal from Riparian Habitat</p> <p><b>Staff Recommendation:</b> Staff recommends approval of up to \$26,814</p>
<b>21gg</b>	<p><b>Applicant:</b> River Network  <b>Name of Water Activity:</b> Support to Increase Environmental &amp; Recreational Project Proposals</p> <p><b>Staff Recommendation:</b> Not Recommended</p>
<b>21hh</b>	<p><b>Applicant:</b> Trout Unlimited  <b>Name of Water Activity:</b> Canyon Creek Fish Passage Project</p> <p>Richard Gytenbeek with Trout Unlimited addressed the Board.</p> <p><b>Staff Recommendation:</b> Staff recommends approval of up to \$101,812</p>
<b>21ii</b>	<p><b>Applicant:</b> Trout Unlimited  <b>Name of Water Activity:</b> Conejos Meadows Resilient Habitat Project</p> <p><b>Staff Recommendation:</b> Staff recommends approval of up to 108,594</p>
<b>21jj</b>	<p><b>Applicant:</b> Windy Gap  <b>Name of Water Activity:</b> Water Activity Enterprise Colorado River Connectivity Channel</p> <p><b>Staff Recommendation:</b> Staff recommends approval of up to \$735,213</p>
<b>21kk</b>	<p><b>Applicant:</b> Yampa Valley  <b>Name of Water Activity:</b> Stream Improvement Charitable Trust Yampa River Habitat &amp; Recreation Improvement Project at Pleasant Valley</p> <p><b>Staff Recommendation:</b> Staff recommends approval of up to \$117,990</p>
<b>21 ll - ss</b>	<p><b>Water Storage and Supply</b></p> <p><b>Action:</b> Report by CWCB staff member Matt Stearns. A motion to approve the staff recommendations was made by Heather Dutton, which was seconded by Steve Anderson. The motion was approved unanimously (9-0).</p> <p><b>Staff Recommendation:</b> Staff Recommendation Staff recommends the following Board action for activities listed in the following table regarding Colorado's Water Plan Grant Program funding. Project approval is contingent on awardees implementing the project consistent with any public health orders and executive orders in effect at the time of implementation.</p> <p>ll. Arkansas Groundwater Users Association Stonewall Springs South Reservoir Storage Purchase \$500,000 Approve \$500,000</p> <p>mm. Blue River Valley Ranch Lakes Association Bobo Strait Reservoir Dredging \$125,000 Not Recommended</p> <p>nn. Castle Rock Water Castle Rock Reservoir No. 2 \$125,000 Approve \$125,000</p> <p>oo. Cherry Creek Project Water Authority Walker Reservoir \$1,000,000 Approve \$1,000,000</p> <p>pp. Cimarron Canal and Reservoir Company Fish Creek Reservoir #2 Repair \$154,134 Not Recommended</p> <p>qq. Colorado River Water Conservation District Crystal River Basin Augmentation Study \$50,000 Approve \$50,000</p> <p>rr. Colorado Water Protective and Development Association Highline Recharge Pond Construction \$42,954 Approve \$42,954</p>

	ss. Huerfano County Water Conservancy District 50% Design of Maria Stevens Reservoir Enlargement \$35,286 Approve \$35,286 Total Recommended for Approval \$1,753,240
<b>21ll</b>	<b>Applicant:</b> Arkansas Groundwater Users Association <b>Name of Water Activity:</b> Stonewall Springs South Reservoir Storage Purchase  <b>Staff Recommendation:</b> Staff recommends approval of up to \$500,000
<b>21mm</b>	<b>Applicant:</b> Blue River Valley Ranch Lakes Association <b>Name of Water Activity:</b> Bobo Strait Reservoir Dredging  <b>Staff Recommendation:</b> Not Recommended
<b>21nn</b>	<b>Applicant:</b> Castle Rock Water <b>Name of Water Activity:</b> Castle Rock Reservoir No. 2  <b>Staff Recommendation:</b> Staff recommends approval of up to \$125,000
<b>21oo</b>	<b>Applicant:</b> Cherry Creek Project Water Authority <b>Name of Water Activity:</b> Walker Reservoir  <b>Staff Recommendation:</b> Staff recommends approval of up to \$1,000,000
<b>21pp</b>	<b>Applicant:</b> Cimarron Canal and Reservoir Company <b>Name of Water Activity:</b> Fish Creek Reservoir #2 Repair  <b>Staff Recommendation:</b> Not Recommended
<b>21qq</b>	<b>Applicant:</b> Colorado River Water Conservation District <b>Name of Water Activity:</b> Crystal River Basin Augmentation Study  <b>Staff Recommendation:</b> Staff recommends approval of up to \$50,000
<b>21rr</b>	<b>Applicant:</b> Colorado Water Protective and Development Association <b>Name of Water Activity:</b> Highline Recharge Pond Construction  <b>Staff Recommendation:</b> Staff recommends approval of up to \$42,954
<b>21ss</b>	<b>Applicant:</b> Huerfano County Water Conservancy District <b>Name of Water Activity:</b> 50% Design of Maria Stevens Reservoir Enlargement  <b>Staff Recommendation:</b> Staff recommends approval of up to \$35,286
	<b>RECESS</b>

Thursday, July 16, 2020

<b>22</b>	<b>Basin Directors' Reports</b>
22A	Gunnison River Basin Director's Report – Steve Anderson
22B	North Platte River Basin Director's Report – Curran Trick
22C	South Platte River Basin Director's Report – Jim Yahn
22D	Arkansas River Basin Director's Report – Greg Felt
22E	City and County of Denver Director's Report – Jessica Brody
22F	Rio Grande River Basin Director's Report – Heather Dutton
22G	Yampa-White River Basin Director's Report – Jaclyn Brown
22H	Colorado River (Mainstem) Basin Director's Report – Gail Schwartz
22I	San Juan/San Miguel-Dolores River Basin Director's Report – Celene Hawkins

#### **ADJOURN**

A motion to adjourn the July 2020 Board meeting was made by Greg Felt, which was seconded by Jim Yahn. The motion was approved unanimously (9-0).

## 7. Board meeting September 2020



**COLORADO**

**Colorado Water  
Conservation Board**

Department of Natural Resources

Jared Polis  
Governor

Dan Gibbs  
DNR Executive Director

Rebecca Mitchell  
CWCB Director

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## September 16 & 17, 2020 Board Meeting Agenda

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A meeting of the CWCB will be held on Wednesday, September 16, 2020 commencing at 8:30 AM and continuing through Thursday, September 17, 2020. The meeting will be held virtually.

A Finance Committee Meeting will be held virtually on Tuesday, September 15, 2020, from 1:00 – 4:30p.m..

The CWCB posts notice 30 days in advance of each regularly scheduled meeting. Notices for special meetings are posted on the website typically within five business days and not less than 24 hours of such a meeting. Notices of regular and special meetings may also be received by email. To receive notices by email please visit:

<https://dwr.state.co.us/Portal/Login/>.

Although dates and times are indicated in this notice and in the following agenda, the CWCB may address and take action on noticed items in any order. Any known changes to the agenda will be announced at the beginning of the meeting. This notice, any late notice(s) of additional items, and briefing memos prepared for the CWCB will be posted at 1313 Sherman Street, Suite 721, Denver, CO 80203, and on our website at <https://cwcb.colorado.gov/>.

The CWCB meeting will be made available through live audio streaming on GoTo Webinar, although Board workshops are not. To listen to the proceedings, click the “Listen to the meeting LIVE!” link on the CWCB website homepage and select the link for the proper day and time. The link will be posted just prior to the start of the meeting.

The CWCB encourages citizens to express their views and provide feedback to the Board on the agenda items. This can be done by sending an email to [viola.bralish@state.co.us](mailto:viola.bralish@state.co.us) by sending a letter to a Board member or to the Chair of the Board, or by attending the meeting. If you want to make a public comment during the meeting you must fill out a [comment sheet](#) 5 days prior to the meeting date and email it to the [Board Coordinator](#). The Board will appreciate hearing your views when it reaches that agenda item. If you have any questions, need special accommodations as a result of a disability, or require further information on any CWCB activity, please contact Viola Bralish at 303-866-3441, ext. 3206. All programs, services, and activities of the CWCB are operated in compliance with the Federal Americans with Disabilities Act (ADA).



Wednesday, September 16, 2020	
8:30 - 8:32	<b>CWCB Call to Order and Pledge of Allegiance</b>
8:32 – 8:35	<b>1. Review and Approve Agenda</b>
8:35 – 8:37	<b>2. Review and Approve July 2020 Board Meeting Minutes</b>
8:37 – 8:40	<b>3. Approve and/or Remove Consent Agenda Items</b>
8:40	<p><b>Board Meeting Dates in 2020</b></p> <p>a. November 18 &amp; 19 – Virtual</p> <p><b>Board Meeting Dates in 2021</b></p> <p>a. January 25 &amp; 26 – TBD</p> <p>b. March 17 &amp; 18 – TBD</p> <p>c. May 19 &amp; 20 – TBD</p> <p>d. July 21 &amp; 22 – TBD</p> <p>e. September 15 &amp; 16 – TBD</p> <p>f. November 17 &amp; 18 - TBD</p>
8:40 -9:40	<p><b>4. Directors' Reports</b></p> <p>a. <b>DNR Executive Director</b></p> <p>b. <b>CWCB Director</b></p> <p>c. <b>IBCC Director</b></p> <p>d. <b>Agriculture Commissioner</b></p> <p>e. <b>State Engineer</b></p> <p>f. <b>Division of Parks and Wildlife Director</b></p> <p>g. <b>Water Resource and Power Development Authority</b></p>
9:40 – 10:10	<p><b>5. Request for Authorization to Initiate Formal Rulemaking to Revise Instream Flow Rules to Implement HB20-1157</b></p> <p><i>Stream and Lake Protection Section</i></p>
10:10-10:25	<p><b>6. Lease of Ruedi Reservoir Water for Instream Flow Use on the Fryingpan River and 15-Mile Reach of the Colorado River (Water Division 5)</b></p> <p><i>Stream and Lake Protection Section</i></p>
10:25-10:40	<b>Morning Break</b>
10:40-11:00	<p><b>7. Financial Matters – Construction Fund and Severance Tax Perpetual Base Fund</b></p> <p><i>Finance Section</i></p> <p>a. Financial Projections and Cash Management</p>



	b. 2020 Wildfire Impact Loans
11:00-11:30	<b>8. Water Project Loans</b> <i>Finance Section</i> <ul style="list-style-type: none"> <li>a. Redlands Water and Power Company – Roller Gate Replacement</li> <li>b. City of Grand Junction – Purdy Mesa Flowline Replacement</li> <li>c. Genesee Water and Sanitation District – Genesee Reservoir No. 1 Enlargement</li> </ul>
11:30-11:45	<b>9. Loan Delinquency Action</b> <i>Finance Section</i> <ul style="list-style-type: none"> <li>a. Two Rivers Water &amp; Farming Company, and Two Rivers Farms F-2, Inc.</li> </ul>
11:45-12:30	<b>LUNCH</b>
12:30-2:00	<b>10. Demand Management Feasibility Investigation</b> <i>Interstate, Federal, and Water Information Section</i>
2:00-2:15	<b>11. Basin Fund MOA Reallocation Request – Dolores Project Pumping Plant Replacement</b> <i>Interstate, Federal, and Water Information Section</i>
2:15-2:20	<b>12. Attorney General’s Report, Legal Briefing, and Executive Session</b>
2:20-2:35	<b>Break to Transition to Executive Session</b>
2:35-3:35	<b>13. Executive Session</b> <ul style="list-style-type: none"> <li>a. Lake Powell Pipeline</li> <li>b. Demand Management</li> <li>c. Chatfield Storage Reallocation Project Environmental Pool Negotiations</li> </ul>
3:35-3:40	<b>14. Report from Executive Session</b>
3:40	<b>RECESS</b>

Thursday, September 17, 2020

8:30 – 10:00	<b>15. Basin Directors' Reports</b> <ul style="list-style-type: none"> <li>a. North Platte River Basin Director's Report</li> <li>b. South Platte River Basin Director's Report</li> <li>c. Arkansas River Basin Director's Report</li> <li>d. City and County of Denver Director's Report</li> <li>e. Rio Grande River Basin Director's Report</li> <li>f. Yampa-White River Basin Director's Report</li> <li>g. Colorado River (Mainstem) Basin Director's Report</li> <li>h. San Juan/San Miguel-Dolores River Basin Director's Report</li> <li>i. Gunnison River Basin Director's Report</li> </ul>		
10:00-10:15	<b>Morning Break</b>		
10:15-10:30	<b><del>16. South Platte River Easement Application—City of Englewood—</del></b> <b>Cancelled</b> <del>——Watershed and Flood Protection Section</del>		
10:30-10:45	<b>17. Status of BIP &amp; Water Plan Update Efforts</b> <i>Water Supply Planning Section</i>		
10:45 – 11:00	<b>18. WSRF Criteria and Guidelines</b> <i>Water Supply Planning Section</i>		
11:00-11:40	<b>19. WSRF Grant Applications</b> <i>Water Supply Planning Section</i>		
	<b>Water Supply Reserve Fund Application Grants at the September 2020 CWCB Board Meeting</b>		
	<b>Agenda Item</b>	<b>Basin</b>	<b>Applicant</b>
	<b>a.</b>	South Platte	Neirbo Hydrogeology
		Metro	
	<b>b.</b>	Arkansas	Lower Arkansas Valley Water Conservancy District
	<b>c.</b>	Arkansas	Pueblo County
	<b>d.</b>	Arkansas	Round Mountain Water and Sanitation District
	<b>e.</b>	Gunnison	Cimarron Canal and Reservoir Company
	<b>f.</b>	Metro	Lookout Mountain Water District
	<b>g.</b>	Metro	Colorado Nonprofit Development Center
			<b>Name of Water Activity</b>
			South Platte River Salinity Study – Phase 2
			Headgate 199 Lining
			Italian and Suburban Lateral Water Improvement Project
			Reservoir Feasibility Study & Design
			Fish Creek Reservoir #2 Repair and Conservation Project
			Upper Beaver Brook Reservoir SCADA System Project
			10.10.10 Water & Climate Program

	<b>h.</b>	Metro	WaterReuse Colorado	Direct Potable Reuse WQCD Stakeholder Process Facilitation
	<b>i.</b>	North Platte	Owl Mountain Partnership	Jackson County Water Structure Improvement Project #3
	<b>j.</b>	Rio Grande	Colorado Rio Grande Restoration Foundation	Conejos River Partnership Project – Phase 1
	<b>k.</b>	South Platte	Colorado State University	Sustaining Plains Aquatic Ecosystems using an Integrated Ecological and Social Approach
	<b>l.</b>	Southwest	Fort Lewis College	Dolores River Adaptive Management Project
	<b>m.</b>	Southwest	Morrison Consolidated Ditch Company	Railroad Siphon Replacement Project
	<b>n.</b>	Southwest	Montezuma Orchard Restoration Project	Innovations in Irrigation To Support Heritage Apple Orchards in SW Colorado
	<b>o.</b>	Southwest	Red Mesa Reservoir and Ditch Company	Red Mesa Reservoir Project
11:40-11:50	<b>20. Water Project Loan/Grant</b> <i>Finance Section</i> a. Florida Consolidated Ditch Company – Florida Canal Diversion Replacement			
11:50	<b>ADJOURN</b>			

## **CWCB Consent Agenda September 16, 2020**

Matters may be placed on the Consent Agenda when the recommended action follows established policy or precedent, there has been a negotiated settlement, or the matter is uncontested and non-controversial. Staff provides memos to CWCB members explaining the matters on the Consent Agenda. Matters on the Consent Agenda are noticed for hearing in the same manner as other agenda items. If a member of the CWCB requests further consideration of an item on the Consent Agenda, the item will be withdrawn from the Consent Agenda and discussed during the meeting or at the next meeting, with action taken after discussion of the item. If a member of the CWCB requests further consideration of an item on the Consent Agenda that pertains to a pending or imminent court action, the matter will be withdrawn from the Consent Agenda and may be discussed during executive session of the same meeting, and any action on that item will be taken in public session. The Consent Agenda may be voted on without reading or discussing individual items. Any CWCB member may request clarification about any matter on the Consent Agenda.

### **1. Statements of Opposition**

#### *Stream & Lake Protection Section*

*The Board will be asked to ratify Statements of Opposition that have been filed by staff to protect instream flow and natural lake level water rights and to protect CWCB's exclusive authority to hold instream flow water rights in the following water court cases:*

- a. Case No. 20CW3029 (Water Division 2): Application of The Bar NI Corporation

### **2. WSRF Grant Amendment**

Basin	Applicant/Grantee	Name of Water Activity
Gunnison	Leroux Creek Water Users Association	Leroux Creek Reservoir System, Dam Outlet Rehabilitation



## COLORADO

### Colorado Water Conservation Board

Department of Natural Resources

1313 Sherman Street, Room 718  
Denver, CO 80203

P (303) 866-3441

F (303) 866-4474

Jared Polis, Governor

Dan Gibbs, DNR Executive Director

Rebecca Mitchell, CWCB Director

TO: Colorado Water Conservation Board Members

FROM: Linda Bassi, Chief  
Kaylea White, Senior Water Resource Specialist  
Stream and Lake Protection Section

DATE: September 16, 2020

AGENDA ITEM: 5. Request for Authorization to Initiate Formal Rulemaking to  
Revise Instream Flow Rules to Implement HB20-1157

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#### Staff recommendation

Staff recommends that the Board:

1. Authorize staff to coordinate with the Attorney General's Office to initiate the formal rulemaking process for revisions to the Rules Concerning the Colorado Instream Flow and Natural Lake Level Program ("ISF Rules") that would address the requirements of House Bill 20-1157, and update: (1) a reference to the CWCB's website in ISF Rule 4c.; and (2) references to Colorado Parks and Wildlife (CPW) throughout the ISF Rules. The formal rulemaking process will include a hearing on the ISF Rules revisions that likely will be scheduled for January 2021.
2. Appoint Deputy Attorney General Amy Beatie as Hearing Officer for the rulemaking hearing to oversee procedural matters, such as setting deadlines and submission of documents.

#### Background

This year, the General Assembly passed and Governor Polis signed House Bill 20-1157 (HB 1157), which has an effective date of September 13, 2020, and is attached to this memo as Attachment A. HB 1157 amends section 37-83-105, C.R.S. (2019), which governs temporary loans of water for instream flow (ISF) use. Among other things, HB 1157 directs the Board to promulgate rules to implement certain provisions of the bill. The CWCB staff, in coordination with the Attorney General's Office, has drafted proposed revisions to the Rules Concerning the Colorado Instream Flow and Natural Lake Level Program (ISF Rules). In addition to addressing the requirements of HB 1157, the revisions also would update: (1) a reference to the CWCB's website in ISF Rule 4c.; and (2) references to Colorado Parks and Wildlife (CPW) throughout the ISF Rules, which currently refer to "the Colorado Division of Wildlife" or "DOW." The proposed Rules revisions and a draft Statement of Basis and Purpose are attached to this memo as Attachments B and C, respectively. A short summary of the rulemaking process and the proposed ISF Rules revisions is set forth below.



## 1. The Rulemaking Process

### a. Meetings with Stakeholders

Section 24-4-103, C.R.S. (2019) governs rulemaking by Colorado state agencies. Section 24-4-103(2) requires agencies contemplating rulemaking to invite a representative group of stakeholders with an interest in the subject matter of the rules to meet informally to discuss and provide input on the proposed revised rules. Staff held virtual stakeholder meetings to discuss the draft ISF Rules revisions on August 3 and August 18, 2020, both of which were well attended. For both meetings, staff provided notice to persons on the ISF Subscription Mailing list and posted notice on the CWCB website. Additionally, the Colorado Water Congress forwarded notices of both meetings to persons on the State Affairs Committee. Staff also gave a presentation on the draft Rules revisions to the Arkansas Basin Roundtable on August 12, 2020. Staff has received several comment letters on the proposed Rules revisions, which are posted on the CWCB website, and has met with some stakeholders individually to discuss their comments. Stakeholders who submitted comments include: Rio Blanco County; the Rio Blanco Water Conservancy District; the White River and Douglas Creeks Conservation Districts; Colorado Water Trust; City of Aurora; Jan Crawford; ACWWA, ECCV, United, and Legacy Water; and the Upper Yampa Water Conservancy District. At the August 18, 2020 stakeholder meeting, staff asked attendees if another stakeholder meeting would be helpful and did not receive any requests for another meeting. Staff has made revisions to the proposed revised Rules based upon comments received from stakeholders.

### b. Formal Rulemaking Process

Upon receiving authorization from the Board to initiate the formal rulemaking process, staff will coordinate with the Attorney General's Office to submit a notice of public rulemaking hearing to the Secretary of State for publication in the Colorado Register. The notice must include: (1) the date and time of the rulemaking hearing; (2) the authority under which the rules are proposed; and (3) a copy of the proposed revised ISF Rules and Statement of Basis and Purpose. The notice of rulemaking also will contain information on public participation in the rulemaking process, including a deadline by which to request party status. Staff also must submit the proposed revised ISF Rules and the Statement of Basis and Purpose to the Department of Regulatory Agencies ("DORA"). The Board must hold the hearing no less than twenty days after publication of the notice in the Colorado Register.

Staff anticipates that after receipt of requests for party status, the Hearing Officer will issue an order establishing a deadline for filing prehearing statements, and other details on participation in the process. After a public hearing, the Board may adopt the revised ISF Rules and then must request an Attorney General opinion on the ISF Rules, and submit that opinion and the adopted ISF Rules to the Secretary of State and the Office of Legislative Legal Services. After receiving approval from the Office of Legislative Legal Services, the Secretary of State will publish the Rules, which will become effective twenty days after the date of publication. If the Board holds the rulemaking hearing in January 2021, it is likely that the rules would become effective in March 2021, depending on the timing of publication by the Secretary of State.

As part of this agenda item, Deputy Attorney General Amy Beatie will brief the Board on the rulemaking process.



## 2. Proposed Revised Rules

The attached proposed revised ISF Rules update: (1) the reference to the CWCB's website in ISF Rule 4c.; and (2) references to Colorado Parks and Wildlife (CPW) throughout the ISF Rules. The revisions also amend ISF Rules 6k. and 6m. to implement HB 1157, and include:

- a. Definitions of expedited and renewable loans;
- b. Notice requirements for both types of loan;
- c. Procedure for evaluating and requesting approval of expedited loans, and for Board review and potential ratification of the CWCB Director's decision on such loans;
- d. Board process for reviewing, receiving public input on, and directing staff on whether to move forward with a proposed renewable loan, including a hearing under ISF Rule 6m(5)., if requested;
- e. Steps the Board must take for proposed renewable loans that would improve the natural environment to a reasonable degree, including requesting and reviewing a biological analysis from CPW on the extent to which the proposed loan will improve the natural environment to a reasonable degree, and giving preference for loans of stored water, when available, over loans of direct flow water;
- f. Board consideration of potential injury to decreed water rights, decreed exchanges of water, or undecreed existing exchanges of water, to the extent that the undecreed existing exchanges have been administratively approved before the date of the Board's consideration;
- g. Staff process for coordinating with a water rights owner on requesting approval from State Engineer of a proposed renewable loan (after Board review and decision); and
- h. Process for Board review and approval of renewing a loan for a second or third ten-year period.

### Attachments:

Attachment A - House Bill 20-1157

Attachment B - Proposed revised ISF Rules

Attachment C - Draft Statement of Basis and Purpose



# An Act

HOUSE BILL 20-1157

BY REPRESENTATIVE(S) Roberts and Will, Arndt, Bird, Buentello, Cutter, Duran, Esgar, Exum, Froelich, Kennedy, Kipp, McCluskie, McKean, McLachlan, Michaelson Jenet, Sandridge, Snyder, Soper, Titone, Valdez D., Woodrow, Young, Becker;  
also SENATOR(S) Donovan, Bridges, Gonzales, Hansen, Moreno, Rodriguez, Winter, Zenzinger, Garcia.

CONCERNING THE COLORADO WATER CONSERVATION BOARD'S AUTHORITY  
TO USE WATER THAT A WATER RIGHT OWNER VOLUNTARILY LOANSTO  
THE BOARD FOR INSTREAM FLOW PURPOSES.

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

**SECTION 1.** In Colorado Revised Statutes, 37-83-105, **amend** (1), (2)(a) introductory portion, (2)(a)(IV), (2)(a)(V), (2)(b) introductory portion, (2)(b)(I) introductory portion, (2)(b)(II), (2)(b)(V), (2)(b)(VI), (2)(b)(VII), and (2)(b)(VIII); and **add** (2)(a)(III.5), (2)(a)(III.7), (2)(a)(VI), (2)(b)(II.5), and (3) as follows:

**37-83-105. Owner may loan agricultural water right - loans to Colorado water conservation board for instream flows - rules.**  
(1) (a) Subject to the limitations of this subsection (1) and pursuant to the

Attachment A  
Agenda Item 5  
Sept 16-17, 2020

*Capital letters or bold & italic numbers indicate new material added to existing law; dashes through words or numbers indicate deletions from existing law and such material is not part of the act.*



procedures set forth in ~~paragraph (b) of subsection (2)~~ SUBSECTION (2)(b) of this section THAT APPLY TO AN EXPEDITED LOAN DESCRIBED IN SUBSECTION (2)(a)(III.7) OF THIS SECTION, the owner of a water right decreed and used solely for agricultural irrigation purposes may loan all or a portion of the water right to another owner of a decreed water right on the same stream system and that is used solely for agricultural irrigation purposes for no more than one hundred eighty days during any one calendar year if the ~~division~~ STATE engineer approves ~~such~~ THE loan in advance and the loan does not cause injury to other decreed water rights.

(b) THE OWNER OF ANY DECREED WATER RIGHT MAY LOAN WATER TO THE COLORADO WATER CONSERVATION BOARD FOR USE AS INSTREAM FLOWS:

(I) TO PRESERVE THE NATURAL ENVIRONMENT TO A REASONABLE DEGREE PURSUANT TO A DECREED INSTREAM FLOW WATER RIGHT HELD BY THE BOARD; OR

(II) TO IMPROVE THE NATURAL ENVIRONMENT TO A REASONABLE DEGREE FOR A STREAM REACH FOR WHICH THE BOARD HOLDS A DECREED INSTREAM FLOW WATER RIGHT.

(2) (a) ~~A water right owner may loan water to the Colorado water conservation board for use as~~ WATER MAY BE USED FOR instream flows pursuant to a ~~decreed instream flow water right held by the board~~ LOAN AUTHORIZED UNDER THIS SECTION for a period not to exceed one hundred twenty days IN A SINGLE CALENDAR YEAR, subject to the following:

(III.5) WATER RIGHTS LOANED PURSUANT TO THIS SECTION 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.

(III.7) AN EXPEDITED LOAN APPROVED TO PRESERVE THE NATURAL ENVIRONMENT TO A REASONABLE DEGREE PURSUANT TO THIS SUBSECTION (2)(a) HAS A TERM OF UP TO ONE YEAR. THE LOAN PERIOD BEGINS WHEN THE STATE ENGINEER APPROVES THE EXPEDITED LOAN. IF AN EXPEDITED LOAN IS APPROVED, THE APPLICANT SHALL NOT REAPPLY FOR AN ADDITIONAL EXPEDITED LOAN OF THE WATER RIGHT.

(IV) (A) A RENEWABLE loan approved TO PRESERVE OR IMPROVE THE NATURAL ENVIRONMENT TO A REASONABLE DEGREE pursuant to this ~~paragraph (a) shall~~ SUBSECTION (2)(a) MUST not be exercised for more than ~~three~~ 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. The ten-year period ~~shall begin~~ BEGINS when the state engineer approves the loan. AN APPLICANT MAY REAPPLY FOR AND the state engineer ~~shall not~~ MAY approve a RENEWABLE loan pursuant to this ~~paragraph (a)~~ SUBSECTION (2)(a) for ~~another~~ UP TO TWO ADDITIONAL ten-year period; ~~except that, if the agreement has not been exercised during the term of the agreement, an applicant may reapply one time by repeating the application process pursuant to this subsection (2)~~ PERIODS.

(B) IF AN APPLICANT HAD PREVIOUSLY BEEN APPROVED FOR AND HAD EXERCISED AN EXPEDITED LOAN PURSUANT TO SUBSECTION (2)(a)(III.7) OF THIS SECTION AND SUBSEQUENTLY APPLIES AND IS APPROVED FOR A RENEWABLE LOAN, THE ONE-YEAR LOAN PERIOD OF THE EXPEDITED LOAN COUNTS AS THE FIRST YEAR OF THE FIVE-YEAR ALLOWANCE FOR THE SUBSEQUENT RENEWABLE LOAN.

(C) IN EACH YEAR THAT A RENEWABLE LOAN IS EXERCISED, THE APPLICANT SHALL PROVIDE THE WRITTEN NOTICE DESCRIBED IN SUBSECTION (2)(b)(II) OF THIS SECTION.

(V) A party may file comments concerning potential injury to ~~such~~ THE party's water rights or decreed conditional water rights due to the operations of the loan of ~~a~~ THE water right ~~to a decreed instream flow right~~ with the state engineer by January 1 of the year following each year that the loan is exercised. The procedures of ~~paragraph (b) of this subsection (2)~~ SUBSECTION (2)(b) OF THIS SECTION regarding notice, opportunity to comment, the state engineer's decision, and an appeal of ~~such~~ THE decision shall again be followed with regard to ~~such~~ THE party's comments. IN AN APPEAL TO THE WATER JUDGE IN THE APPLICABLE WATER DIVISION OF THE DETERMINATION MADE BY THE STATE ENGINEER PURSUANT TO THIS SECTION, THE APPLICANT HAS THE BURDEN OF PROOF THAT THE LOANED WATER RIGHT DOES NOT CAUSE INJURY TO OTHER VESTED OR CONDITIONALLY DECREED WATER RIGHTS. ANY APPEAL OF A DECISION BY THE STATE ENGINEER CONCERNING THE LOAN PURSUANT TO THIS SECTION SHALL BE MADE IN ACCORDANCE WITH THE PROCEDURES SET FORTH IN SUBSECTION (2)(b)(VIII) OF THIS SECTION.

(VI) RULES PROMULGATED BY THE COLORADO WATER CONSERVATION BOARD PURSUANT TO SUBSECTION (3) OF THIS SECTION.

(b) In determining whether injury will occur, the ~~division~~ STATE engineer shall ensure that the following conditions are met:

(I) The ~~proponent~~ APPLICANT has filed a request for approval of the loan with the ~~division~~ STATE engineer, together with a filing fee in the amount of ~~one~~ THREE hundred dollars. ~~Moneys from~~ THE STATE ENGINEER SHALL TRANSMIT the fee ~~shall be transmitted~~ to the state treasurer, and ~~deposited~~ WHO SHALL DEPOSIT THE FEE in the water resources cash fund created in section 37-80-111.7 (1). The request for approval ~~shall~~ MUST include:

(II) The ~~proponent~~ APPLICANT has SUBMITTED PROOF TO THE STATE ENGINEER, IN A FORM AND MANNER DETERMINED BY THE STATE ENGINEER, DEMONSTRATING THAT THE APPLICANT provided written notice of the request for approval of the loan by first-class mail or electronic mail to:

(A) 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 ~~proof of such notice is filed with the division engineer;~~

(B) 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.

(II.5) THE APPLICANT HAS PROVEN THAT THE LOAN WILL NOT INJURE DECREED WATER RIGHTS, DECREED EXCHANGES OF WATER, OR OTHER WATER USERS' UNDECREED EXISTING EXCHANGES OF WATER TO THE EXTENT THAT THE UNDECREED EXISTING EXCHANGES HAVE BEEN ADMINISTRATIVELY APPROVED BEFORE THE DATE OF THE FILING OF THE REQUEST FOR APPROVAL OF THE LOAN.

(V) The ~~division~~ STATE engineer has given the owners of water rights and decreed conditional water rights ~~fifteen days after the date of mailing of notice under subparagraph (II) of this paragraph~~ (b) THE OPPORTUNITY to file comments on the proposed loan ~~except that the division engineer may act on the application immediately after the applicant~~

~~provides evidence that all persons entitled to notice of the application under subparagraph (II) of this paragraph (b) have either consented to or commented on the application. Such~~ WITHIN THE RELEVANT TIME FRAME INDICATED IN THIS SUBSECTION (2)(b)(V). THE comments ~~shall~~ MUST include any claim of injury or any terms and conditions that should be imposed upon the proposed loan to prevent injury to a party's water ~~right~~ RIGHTS and any other information the commenting party wishes the ~~division~~ STATE engineer to consider in reviewing the proposed loan. THE STATE ENGINEER SHALL PROVIDE THE PARTIES ENTITLED TO NOTICE UNDER SUBSECTION (2)(b)(II) OF THIS SECTION:

(A) FIFTEEN DAYS AFTER THE DATE OF MAILING OF NOTICE FOR EXPEDITED LOANS AUTHORIZED UNDER SUBSECTION (2)(a)(III.7) OF THIS SECTION TO PROVIDE COMMENTS ON THE PROPOSED LOAN; AND

(B) SIXTY DAYS AFTER THE DATE OF MAILING OF NOTICE FOR RENEWABLE LOANS AUTHORIZED UNDER SUBSECTION (2)(a)(IV) OF THIS SECTION TO PROVIDE COMMENTS ON THE PROPOSED LOAN.

(VI) The ~~division~~ STATE engineer, after consideration of any comments received, has determined that the operation and administration of the proposed loan will not cause injury to other decreed water rights, DECREED EXCHANGES, OR UNDECREED EXCHANGES AS DESCRIBED IN SUBSECTION (2)(b)(II.5) OF THIS SECTION and, for loans made pursuant to ~~paragraph (a) of this subsection (2)~~ SUBSECTION (2)(a) OF THIS SECTION, will not affect Colorado's compact entitlements. The ~~division~~ STATE engineer shall impose such terms and conditions as are necessary to ensure that these standards are met. In making the determinations specified in this ~~subparagraph (VI)~~ SUBSECTION (2)(b)(VI), the ~~division~~ STATE engineer ~~shall~~ NEED not ~~be required to~~ hold any formal hearings or conduct any other formal proceedings, but may conduct a hearing or formal proceeding if the ~~division~~ STATE engineer finds it necessary to address the issues.

(VII) The ~~division~~ STATE engineer shall approve or deny the proposed loan within ~~twenty~~ TEN days after the ~~date of mailing of notice under subparagraph (II) of this paragraph (b), or within five days after the applicant provides evidence that all persons entitled to notice of the application under subparagraph (II) of this paragraph (b) have either consented to or commented on the application, whichever is earlier~~ PERIOD FOR COMMENTS ON THE PROPOSED LOAN SPECIFIED IN SUBSECTION (2)(b)(V)

OF THIS SECTION HAS EXPIRED.

(VIII) When the ~~division~~ STATE engineer approves or denies a proposed loan, the ~~division~~ STATE engineer shall serve a copy of the decision on all parties to the application by first-class mail or, if ~~such~~ THE parties have so elected, by electronic mail. Neither the approval nor the denial by the ~~division~~ STATE engineer ~~shall create~~ CREATES any presumptions ~~shift the burden of proof, or serve~~ OR SERVES as a defense in any legal action that may be initiated concerning the loan. ~~Any~~ A PARTY MAY FILE AN appeal of a decision by the ~~division~~ STATE engineer concerning the loan pursuant to this section ~~shall be made~~ to the water judge in the applicable water division within fifteen days after the date ~~on which~~ THAT THE STATE ENGINEER, FOLLOWING THE STATE ENGINEER'S CONSIDERATION OF ANY COMMENTS SUBMITTED PURSUANT TO SUBSECTION (2)(a)(V) OF THIS SECTION, SERVES the decision ~~is served~~ on the parties to the application. THE APPLICANT HAS THE BURDEN OF PROOF TO DEMONSTRATE THAT THE LOANED WATER RIGHT DOES NOT CAUSE INJURY TO OTHER VESTED OR CONDITIONALLY DECREED WATER RIGHTS, DECREED EXCHANGES, OR UNDECREED EXCHANGES AS DESCRIBED IN SUBSECTION (2)(b)(II.5) OF THIS SECTION. The water judge shall hear ~~such~~ AND DETERMINE THE appeal on an expedited basis USING THE PROCEDURES AND STANDARDS SET FORTH IN SECTION 37-92-304 (3) CONCERNING MATTERS REREFERRED TO THE WATER JUDGE BY THE WATER REFEREE.

(3) THE COLORADO WATER CONSERVATION BOARD SHALL PROMULGATE RULES REGARDING THE FOLLOWING NECESSARY STEPS FOR ITS REVIEW AND ACCEPTANCE OF LOANS FOR INSTREAM FLOW USE PURSUANT TO SUBSECTION (1)(b)(II) OF THIS SECTION:

(a) THE BOARD'S REVIEW OF THE PROPOSED LOAN, INCLUDING A REQUIREMENT THAT THE BOARD REQUEST AND REVIEW A BIOLOGICAL ANALYSIS FROM THE DIVISION OF PARKS AND WILDLIFE CONCERNING THE EXTENT TO WHICH THE PROPOSED LOAN WILL IMPROVE THE NATURAL ENVIRONMENT TO A REASONABLE DEGREE;

(b) A REQUIREMENT THAT WHEN CONSIDERING A PROPOSED LOAN, THE BOARD SHALL GIVE PREFERENCE TO LOANS OF STORED WATER, WHEN AVAILABLE, OVER LOANS OF DIRECT FLOW WATER; AND

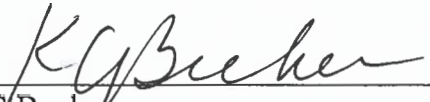
(c) THE BOARD'S DETERMINATION, AFTER A HEARING ON THE

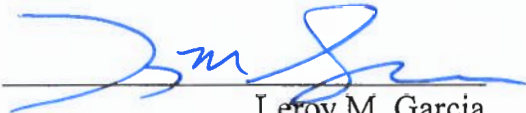
MATTER, IF REQUESTED, WHETHER TO ACCEPT THE PROPOSED LOAN.

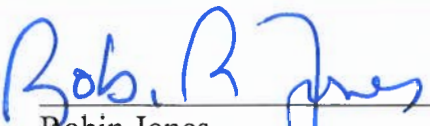
**SECTION 2. Act subject to petition - effective date - applicability.** (1) This act takes effect at 12:01 a.m. on the day following the expiration of the ninety-day period after final adjournment of the general assembly (August 5, 2020, if adjournment sine die is on May 6, 2020); except that, if a referendum petition is filed pursuant to section 1 (3) of article V of the state constitution against this act or an item, section, or part of this act within such period, then the act, item, section, or part will not take effect unless approved by the people at the general election to be held in November 2020 and, in such case, will take effect on the date of the official declaration of the vote thereon by the governor.

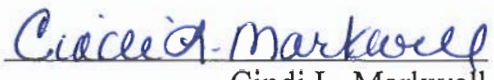


(2) This act applies to conduct occurring on or after the applicable effective date of this act.

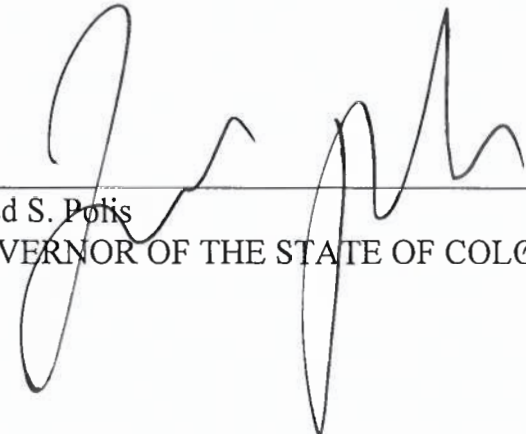
  
KC Becker  
SPEAKER OF THE HOUSE  
OF REPRESENTATIVES

  
Leroy M. Garcia  
PRESIDENT OF  
THE SENATE

  
Robin Jones  
CHIEF CLERK OF THE HOUSE  
OF REPRESENTATIVES

  
Cindi L. Markwell  
SECRETARY OF  
THE SENATE

APPROVED March 20, 2020 at 12:50 pm  
(Date and Time)

  
Jared S. Polis  
GOVERNOR OF THE STATE OF COLORADO

## 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 prepare and submit 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 provide 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~~ 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.**

...

**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.**

...

**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:



...

- (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 CPW~~DOW~~) 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.

...

- (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 CPW~~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.

...

- (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:

...

- iii. A provision allowing CWCB or CPW~~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);

#### **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.

## 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” or “CWCB”). The Rules Concerning the Colorado Instream Flow and Natural Lake Level Program, 2 CCR 408-2 (“Rules”), initially adopted in 1993, codify and establish procedures for the Board to implement the ISF Program.

In 2020, the Board amended the Rules to: (1) address the requirements of House Bill 20-1157 (codified at section 37-83-105, C.R.S.); (2) update a reference to the CWCB’s website; and (3) update references to Colorado Parks and Wildlife (“CPW”). The statutory authority for the Rules and the 2020 revisions to the Rules is found at sections 37-60-108, 37-83-105(3), and 37-92-102(3), C.R.S. (2020).

For the 2020 revisions, the Board revised Rule 4c. to update the CWCB website address, and amended Rules 6f.(2); 7d.; 8i.(3)(f), (h), and (l)(iii); and 11c. to update references to Colorado Parks and Wildlife (“CPW”). The Board also revised Rules 6k. and 6m. to address requirements of House Bill 20-1157 regarding temporary expedited and renewable loans of water to the Board for instream flow (“ISF”) use.

Specifically, Rule 6k. defines temporary (expedited and renewable) loans; describes allowable uses for each type of loan and time periods for which they may be exercised; and refers to the owner of a decreed water right who has offered water to the Board for an expedited or renewable loan as an “applicant.” The language of Rule 6k.(1) previously pertained to all temporary loans of water but now is split into Rule 6k.(1) and 6k.(2) to address expedited and temporary loans separately. Rule 6k.(1) now addresses expedited loans, describing: (a) limitations on the use of such loans; (b) the timing of the CWCB Director’s response to an offer of an expedited loan of water for temporary ISF use, and though applicant is ultimately responsible for submitting documentation and requesting approval, the actions staff will take in coordination with an applicant to request approval from the State Engineer of an expedited loan, including preparing and submitting documentation and providing written notice as required by the statute; and (c) the Board’s delegation of authority to the CWCB Director, provided that the State Engineer has determined that no injury will result from the expedited loan, to: (i) accept and execute an agreement for the expedited loan of water; and (ii) take any administrative action necessary to put the loaned water to instream flow use. Rule 6k.(1)(d) revisions confirm that the CWCB’s use of water under an expedited loan is subject to the CWCB’s decreed instream flow rate(s), time period(s) and reach(es) and any conditions imposed by the State Engineer to prevent injury. Rule 6k.(1)(e) describes the timing of the Board’s review and action on the CWCB Director’s decision regarding an offer of an expedited loan, and now clarifies that if applicant agrees the loan offer should be rejected, that decision does not have to be brought to the Board. Rule 6k.(1)(f) directs the Board, Director, and staff to expedite all actions necessary to implement expedited loans under Rule 6k.(1).

Rule 6k.(2) is a completely new provision that addresses renewable loans of water for temporary instream flow use. Rule 6k.(2)(a) identifies timing limitations on the exercise of renewable loans and provides that 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. Rules 6k.(2)(b) and (c) identify the Board process for reviewing, considering public comment, and directing Staff whether to move forward with a proposed renewable loan, and provide direction on how

a person can request a hearing on a proposed renewable loan. Rule 6k.(2)(d) sets forth actions the Board will take when considering a proposed renewable loan to improve the natural environment to a reasonable degree. Rule 6k.(2)(e) describes the types of water rights and water activities the Board must consider any potential injury to when evaluating a proposed renewable loan. Rules 6k.(2)(f) and (g) describe the actions the Board authorizes and directs Staff to take when the Board directs Staff to move forward with a proposed renewable loan, including coordinating with the applicant in preparing and submitting documentation and providing written notice as required by statute, though the applicant is ultimately responsible for these acts, and provided that the State Engineer determines no injury will result from the proposed loan, executing an agreement for the loan and taking any administrative action necessary to put the loaned water to instream flow use. Rule 6k.(2)(h) provides that the CWCB's instream flow use of loaned water shall not extend beyond the subject 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. Rule 6k.(2)(i) provides that in each year that a renewable loan is exercised, the applicant, coordinating with Staff if necessary, shall provide the written notice required by statute. Rule 6k.(2)(j) sets forth the Board's process for reviewing, considering public comment, and deciding whether to authorize Staff to coordinate with an applicant on applying for a renewal of an existing renewable loan for an additional ten-year period, including preparing and submitting documentation and providing written notice as required by statute.

Rule 6k.(3) is taken directly from HB20-1157 and provides that 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.

In 2020, the Board also amended Rule 6m. to exclude expedited and temporary loans from the process in Rules 11a-11c, and to address the hearing process for renewable loans, which differs from the hearing process for other acquisitions of water for instream flow use only regarding to whom and when notice of a hearing will be provided. Rule 6m.(5)(d) has been added and provides that at least thirty days prior to the hearing date, the Board shall provide written notice of a hearing on a proposed renewable loan, including the process and deadlines for participating in the hearing, to the applicant and to the recipients specified in section 37-83-105(2)(b)(II), C.R.S.

# Request for Authorization to Initiate Formal Rulemaking to Revise Instream Flow Rules to Implement HB 20-1157

September 16-17, 2020 Board Meeting



# ISF Rules Revisions Update

Revising ISF Rules to:

- Comply with and implement HB 1157, and update:
  - Reference to CWCB website
  - References to Colorado Parks & Wildlife

Since July CWCB meeting:

- Two informal stakeholder meetings (August 3 and 18)
- August 12 Rules presentation to Arkansas Basin Roundtable
- Communications with individual stakeholders
- HB 1157 became effective September 13, 2020



**Agenda Item 5**

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Conservation Board  
Department of Natural Resources

# Rulemaking Process & Timing

- Today, staff will request Board to:
  - authorize initiating formal rulemaking process, and
  - appoint Deputy AG Amy Beatie as Hearing Officer.
- If authorized, staff and AG's Office will coordinate on filing a Notice of Rulemaking with Secretary of State (includes proposed Rules, Statement of Basis and Purpose, and info on how to obtain party status), which will be published in Colorado Register.
- When have list of parties, Hearing Officer would issue order establishing deadlines and process.
- Notice will set hearing for January 2021.



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# Potential Timeline

**Oct. 15:** File Notice of Rulemaking with Secretary of State

**Oct. 25:** Notice, proposed Rules, and SBP published in CO Register.

**1-2 wks later:** Notices of Party Status due.

**1-2 wks later :** Hearing Officer issues order re: deadlines, prehearing conference date.

**Jan. 25:** Board holds hearing and adopts Rules.

**Feb. 12:** File adopted Rules with Sec of State and Office of Legislative Legal Services.

**Feb. 25:** Rules published in CO Register.

**March 17:** Rules effective.



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Conservation Board  
Department of Natural Resources

# Public Input

- 8 comment letters received to date
- Comments expressed at stakeholder meetings
- Staff made several changes to draft Rules in response to comments.
- Examples of comments:
  - Need to ensure public access to all info submitted to State Engineer when applying for approval of renewable loan.
  - Need to condition Board direction to staff to move forward with renewable loan on State Engineer finding of no injury.
  - Requests for procedural clarifications



**Agenda Item 5**

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# Draft Rules Revisions – 6k. and 6k.(1)

- 6k. defines temporary (expedited and renewable) loans; describes allowable uses for each type of loan and time periods for which they may be exercised.
- 6k.1 addresses expedited loans, including:
  - limitations on use of such loans;
  - notice and documentation requirements;
  - staff responsibilities;
  - CWCB Director's role; and
  - Board review and action.

# Draft Rules Revisions - 6k.(2)

6k.2 addresses renewable loans, including:

- various limitations on the exercise of renewable loans;
- Board process for reviewing, considering public comment, and directing Staff whether to move forward with a proposed renewable loan;
- actions the Board will take when considering a proposed renewable loan to improve the natural environment to a reasonable degree;
- types of water rights and water activities the Board must consider any potential injury to when evaluating a proposed renewable loan;



# Draft Rules Revisions - 6k.(2)

- actions the Board authorizes and directs Staff to take when directing Staff to move forward with a proposed renewable loan, including:
  - coordinating with the applicant on documentation and notice requirements; and
  - provided that State Engineer determines no injury will result from proposed loan, executing an agreement for loan and taking any administrative action necessary to put the loaned water to ISF use;

# Draft Rules Revisions - 6k.(2)

- direction on how a person can request a hearing on a proposed renewable loan; and
- Board process for reviewing, considering public comment, and deciding whether to authorize Staff to coordinate with an applicant on applying for a renewal of an existing renewable loan for an additional ten-year period.



**Agenda Item 5**

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# Draft Rules Revisions – 6k.(3) and 6m.

- 6k.3 provides that water rights loaned to CWCB 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.
- Amendments to 6m. address the hearing process for renewable loans.
  - differs from hearing process for other acquisitions of water for ISF use only regarding to whom and when notice of a hearing will be provided.

# Statement of Basis and Purpose

- APA requires agency to submit with notice of rulemaking “... a statement, in plain language, concerning the subject matter or purpose of the proposed rule or amendment ...”
- Provides road map to the rules revisions



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Department of Natural Resources

**Agenda Item 5**



# Staff recommends that the Board:

1. Authorize staff to coordinate with the AG's Office to initiate the formal rulemaking process for revisions to the Rules Concerning the Colorado Instream Flow and Natural Lake Level Program ("ISF Rules") that would address the requirements of HB 20-1157, and update: (a) a reference to the CWCB's website in ISF Rule 4c.; and (b) references to Colorado Parks and Wildlife (CPW) throughout the ISF Rules. The formal rulemaking process will include a hearing on the ISF Rules revisions that will be scheduled for January 2021.
2. Appoint Deputy Attorney General Amy Beatie as Hearing Officer for the rulemaking hearing to oversee procedural matters, such as setting deadlines and submission of documents.



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Department of Natural Resources

Jared Polis  
Governor

Dan Gibbs  
DNR Executive Director

Rebecca Mitchell  
CWCB Director

## DRAFT

### Summary Minutes and Record of Decisions September 16 & 17, 2020 Board Meeting

A regular meeting of the Colorado Water Conservation Board (CWCB) convened virtually. The meeting was called to order by Chair Celene Hawkins. Ten voting members were present at the call to order, so a quorum was present (at least 6 required). Voting members present were: Jim Yahn, Greg Felt, Heather Dutton, Celene Hawkins, Steven Anderson, Jaclyn Brown, Gail Schwartz, Jessica Brody, and Curran Trick, and ex-officio voting member Dan Gibbs, Executive Director of the Department of Natural Resources. Non-voting ex officio members present or represented were: Robert Harris, Colorado Parks and Wildlife; Jordan Beezley, Department of Agriculture Commissioner; Kevin Rein, State Engineer; Russell George, Director of Compact Negotiations; and Rebecca Mitchell, Colorado Water Conservation Board Director. Counsel to the Board, Deputy Attorney General Amy Beatie, was also in attendance.

On the second day, the meeting was called to order by Chair Celene Hawkins. Nine voting members were present at the call to order, so a quorum was present (at least 6 required). The voting members present were: Jaclyn Brown, Gail Schwartz, Jessica Brody, Steven Anderson, Curran Trick, Jim Yahn, Greg Felt, and Heather Dutton. Ex-officio voting member Dan Gibbs, Executive Director of the Department of Natural Resources was not present. Non-voting ex officio members present or represented were: Phil Weiser, Attorney General, Robert Harris, Colorado Parks and Wildlife; Kevin Rein, State Engineer; Russell George, Director of Compact Negotiations; and Rebecca Mitchell, Colorado Water Conservation Board Director. Counsel to the Board, Deputy Attorney General Amy Beatie, was also in attendance.





Wednesday, September 16, 2020

<b>1</b>	<b>Review and Approve Agenda</b>  A motion to approve the agenda was made by Steve Anderson, which was seconded by Heather Dutton. The motion was approved unanimously (10-0).
<b>2</b>	<b>Review and Approve July 15 &amp; 16, 2020 Board Meeting Minutes</b> A motion to approve the July 2020 Board minutes was made by Greg Felt, which was seconded by Jim Yahn. The motion was approved unanimously (10-0).
<b>3</b>	<b>Approve and/or Remove Consent Agenda Items</b> A motion to approve the Consent Agenda Items was made by Steve Anderson, which was seconded by Jim Yahn. The motion was approved unanimously (10-0).  <b>Item 1.a</b> - Case No. 20CW3029 (Water Division 2); The Bar NI Corporation <b>Summary of Water Court Application:</b> Application for change of water rights and to amend plan for augmentation. <b>Staff Recommendation:</b> Staff recommends that the Board ratify the filing of a Statement of Opposition filed on behalf of the Board in August 2020 to protect CWCB's instream flow water rights.  <b>Item 2 - Staff Recommendation</b> – Action Items: WSRF Grant Amendment: Request by grantee to amend existing WSRF Grant to include additional infrastructure beyond approved Statement of Work and Budget. No change to the current total grant amount is proposed. Contract No.: CTGG1 2019-3492 Water Activity Name: Leroux Creek Reservoir System, Dam Outlet Rehabilitation Grantee: Leroux Creek Water Users Association Recommending Roundtable: Gunnison (original request and amendment) WSRF Grant Amount: \$50,000 Gunnison Basin Account \$150,000 Statewide Account \$200,000 Total Grant Amount
<b>4</b>	<b>Directors' Reports</b>
<b>4a.</b>	DNR Executive Director - Dan Gibbs
<b>4b.</b>	CWCB Director - Rebecca Mitchell
<b>4c.</b>	IBCC Director - Russell George
<b>4d.</b>	Agriculture Commissioner – Jordan Beezley
<b>4e.</b>	State Engineer - Kevin Rein
<b>4f.</b>	Division of Parks and Wildlife Director - Robert Harris
<b>4g.</b>	Water Resource and Power Development Authority - Keith Laughlin
<b>5</b>	<b>Request for Authorization to Initiate Formal Rulemaking to Revise Instream Flow Rules to Implement HB20-1157</b> <i>Stream and Lake Protection Section</i> <b>Action:</b> Report by CWCB staff member Linda Bassi. A motion to approve the staff recommendation was made by Jessica Brody, which was seconded by Heather Dutton. The motion was approved unanimously (10-0).  <b>Staff Recommendation:</b> <ol style="list-style-type: none"> <li>Authorize staff to coordinate with the Attorney General's Office to initiate the formal rulemaking process for revisions to the Rules Concerning the Colorado Instream Flow and Natural Lake Level Program ("ISF Rules") that would address the requirements of House Bill 20-1157, and update: (1) a</li> </ol>

	<p>reference to the CWCB's website in ISF Rule 4c.; and (2) references to Colorado Parks and Wildlife (CPW) throughout the ISF Rules. The formal rulemaking process will include a hearing on the ISF Rules revisions that likely will be scheduled for January 2021.</p> <p>2. Appoint Deputy Attorney General Amy Beatie as Hearing Officer for the rulemaking hearing to oversee procedural matters, such as setting deadlines and submission of documents.</p>
6	<p><b>Lease of Ruedi Reservoir Water for Instream Flow Use on the Fryingpan River and 15-Mile Reach of the Colorado River (Water Division 5)</b>  <i>Stream and Lake Protection Section</i></p> <p><b>Action:</b> Report by CWCB staff member Linda Bassi.</p> <p><i>This is an informational item with no Board action required.</i>  <i>Pursuant to Rule 6b. of the Rules Concerning the Colorado Instream Flow and Natural Lake Level Program ("ISF Rules"), the Board's consideration of this proposal at this meeting will initiate the 120-day period for Board review. No formal action is required at this time. The initial presentation of this proposal provides an opportunity for the Board and the public to identify questions or concerns that Staff will address at this or a subsequent meeting.</i></p>
7	<p><b>Financial Matters – Construction Fund and Severance Tax Perpetual Base Fund</b>  <i>Finance Section</i></p>
7a.	<p><b>Financial Projections and Cash Management Report</b>  <b>Action:</b> Report by CWCB staff member Kirk Russell.</p> <p><i>This is an informational item with no Board action required.</i></p>
7b.	<p><b>2020 Wildfire Impact Loans</b></p> <p><b>Action:</b> Report by CWCB staff member Kirk Russell. A motion to approve the staff recommendation was made by Jim Yahn, which was seconded by Heather Dutton. Gail Schwartz asked to possibly amend the recommendation to allow flexibility that would address Director Hawkin's objective to look at statewide needs. Director Schwartz would like to see flexibility in the criteria being built in so the Board can revisit the criteria later. The motion was approved unanimously (10-0).</p> <p><b>Staff Recommendation:</b> Staff recommends the Board make available \$10,000,000 for Wildfire and Flood Impact Loans. The 30-year term loans will be available at zero percent interest with no payments for three years followed by 27 years of repayment at the interest rate established by Financial Policy #7 for a 30 year loan. This loan funding opportunity is available to eligible applicants serving or receiving water from areas under a Governor's Emergency Declaration. Funding will be budgeted annually and remain available for applications until a modifying action by the Board is made.</p>
8	<p><b>Water Project Loans</b>  <i>Finance Section</i></p>
8a.	<p><b>Redlands Water and Power Company – Roller Gate Replacement</b></p> <p><b>Action:</b> Report by CWCB staff member Cole Bedford. A motion to approve the staff recommendation was made by Jim Yahn, which was seconded by Heather Dutton. The motion was approved unanimously (10-0).</p>

	<p><b>Staff Recommendation:</b> Staff recommends the Board approve a loan not to exceed \$404,000 (\$400,000 for Project costs and \$4,000 for the 1% service fee) to the Redlands Water and Power Company for costs related to the Roller Gate Replacement Project, from the Severance Tax Perpetual Base Fund. The loan terms shall be 20 years at a reduced blended interest rate of 1.50% per annum. Security for the loan shall be in compliance with CWCB Financial Policy #5.</p>
8b.	<p><b>City of Grand Junction – Purdy Mesa Flowline Replacement</b></p> <p><b>Action:</b> Report by CWCB staff member Cole Bedford. A motion to approve the staff recommendation was made by Gail Schwartz, which was seconded by Jessica Brody. The motion was approved unanimously (10-0).</p> <p><b>Staff Recommendation:</b> Staff recommends the Board approve a loan not to exceed \$7,070,000 (\$7,000,000 for Project costs and \$70,000 for the 1% service fee) to the City of Grand Junction acting by and through its Water Activity Enterprise for costs related to the Purdy Mesa Flowline Replacement Project, from the Severance Tax Perpetual Base Fund. The loan terms shall be 20 years at a reduced low-income municipal interest rate of 1.50% per annum. Security for the loan shall be in compliance with CWCB Financial Policy #5.</p>
8c.	<p><b>Genesee Water and Sanitation District – Genesee Reservoir No. 1 Enlargement</b></p> <p><b>Action:</b> Report by CWCB staff member Rachel Pittinger. A motion to approve the staff recommendation was made by Gail Schwartz, which was seconded by Steve Anderson. The motion was approved unanimously (10-0).</p> <p><b>Staff Recommendation:</b> Staff recommends the Board approve a loan not to exceed \$4,242,000 (\$4,200,000 for project costs and \$42,000 for the 1% service fee) to the Genesee Water and Sanitation District for costs related to the Genesee Reservoir No. 1 Enlargement, from the Construction Fund. The loan term will be 40 years at a high-income municipal interest rate of 2.50% per annum. Security for the loan shall be in compliance with CWCB Financial Policy #5.</p>
9	<p><b>Loan Delinquency Action</b> <i>Finance Section</i></p>
9a.	<p><b>Two Rivers Water &amp; Farming Company, and Two Rivers Farms F-2, Inc.</b></p> <p><b>Action:</b> Report by CWCB staff member Kirk Russell. A motion to approve the staff recommendation was made by Greg Felt, which was seconded by Jim Yahn. The motion was approved unanimously (9-0).</p> <p><b>Staff Recommendation:</b> Staff recommends the Board approve the following schedule/actions towards collection and foreclosure on loan contract C150328A (CT2015-164) delinquency if no resolution by the Borrower has been reached by the following dates:</p> <ul style="list-style-type: none"> <li>• October 1, 2020 - Notify Borrower via certified mail of Board's intent to proceed with this collection and foreclose schedule.</li> <li>• November 2020 Board Meeting – Borrower's last opportunity to address the Board prior to the Board's decision to declare the entire loan obligation paid in full.</li> <li>• December 1, 2020 – staff will notify the Borrower that the entire loan obligation is due by March 1, 2021. This includes outstanding loan balance and late fees payable by March 1, 2021 in the amount of \$637,146.97 (\$621,637.50 Principal + \$3,800.54 Late fee + \$11,708.93 Accrued Interest).</li> </ul>

	<ul style="list-style-type: none"> <li>January 2021 Board Meeting – Staff and the Attorney General’s Office will present options available for foreclosure proceedings if loan is not paid in full by March 1.</li> <li>March 1, 2021 – CWCB will foreclose on the loan as directed by the Board.</li> </ul>
<b>10</b>	<b>Demand Management Feasibility Investigation</b> <i>Interstate, Federal, and Water Information Section</i>
	<p><b>Action:</b> Report by CWCB staff member Amy Ostdiek. Paul Bruchez addressed the Board.</p> <p><i>This is an informational item with no Board action required.</i></p>
<b>11</b>	<b>Basin Fund MOA Reallocation Request – Dolores Project Pumping Plant Replacement</b> <i>Interstate, Federal, and Water Information Section</i>
	<p><b>Action:</b> Report by CWCB staff member Alexander Funk. Ken Curtis with the Dolores Water Conservancy District addressed the Board.</p> <p><b>Staff Recommendation:</b> Staff recommends that the CWCB Board approve the proposed Dolores Project Pumping Plant Replacement MOA reallocation request.</p>
<b>12</b>	<b>Attorney General’s Report, Legal Briefing, and Executive Session</b>
	<p><b>Action:</b> Report by Counsel to the Board, Deputy Attorney General Amy Beatie. A motion to go into Executive Session was made by Jessica Brody, which was seconded by Greg Felt. The motion was approved unanimously (9-0).</p>
<b>13</b>	<b>Executive Session</b> <ul style="list-style-type: none"> <li>a. Lake Powell Pipeline</li> <li>b. Demand Management</li> <li>c. Chatfield Storage Reallocation Project Environment Pool Negotiations - Jessica Brody recused herself from the discussion.</li> </ul>
<b>14</b>	<b>Report from Executive Session</b>
	<p><b>Action:</b> Report by Counsel to the Board, Deputy Attorney General Amy Beatie. A motion to go out of Executive Session was made by Greg Felt, which was seconded by Jessica Brody. The motion was approved unanimously (9-0)</p>
<b>15</b>	<b>Basin Directors’ Reports</b>
<b>15a.</b>	North Platte River Basin Director’s Report – Curran Trick
<b>15b.</b>	South Platte River Basin Director’s Report – Jim Yahn
<b>15c.</b>	Arkansas River Basin Director’s Report – Greg Felt
<b>15d.</b>	City and County of Denver Director’s Report – Jessica Brody
<b>15e.</b>	Rio Grande River Basin Director’s Report – Heather Dutton
<b>15f.</b>	Yampa-White River Basin Director’s Report – Jaclyn Brown
<b>15g.</b>	Colorado River (Mainstem) Basin Director’s Report – Gail Schwartz
<b>15h.</b>	San Juan/San Miguel-Dolores River Basin Director’s Report – Celene Hawkins
<b>15i.</b>	Gunnison River Basin Director’s Report – Steve Anderson

16	<b>South Platte River Easement Application – City of Englewood – Agenda Item Cancelled</b> <i>Watershed and Flood Protection Section</i>
17	<b>Status of BIP &amp; Plan Update Efforts</b> <i>Water Supply Planning Section</i>  <b>Action:</b> Report by CWCB staff members Russ Sands and Megan Holcomb.  <i>This is an informational item with no Board action required.</i>
18	<b>WSRF Criteria and Guidelines</b> <i>Water Supply Planning Section</i>  <b>Action:</b> Report by CWCB staff member Russ Sands. A motion to approve the staff recommendation was made by Jessica Brody, which was seconded by Greg Felt. The motion was approved unanimously (9-0).  <b>Staff Recommendation:</b> Staff recommends approval of the proposed Criteria & Guideline changes. Move from a three-time annual (40%-30%-30%) distribution to one time per year on September 1. Move all deadlines up by one month, allowing two months before each board meeting (instead of one). Multiple changes are needed to update outdated references and enhance clarity of what is required.
19	<b>WSRF Grant Applications</b> <i>Water Supply Planning Section</i>
19a.	<b>Basin: South Platte and Metro</b> <b>Applicant:</b> Neirbo Hydrogeology <b>Name of Water Activity:</b> South Platte River Salinity Study – Phase 2  <b>Action:</b> Report by CWCB staff member Kathryn Weismiller. Grady O'Brien with Neirbo Hydrogeology addressed the Board. A motion to approve the staff recommendation was made by Jim Yahn, which was seconded by Jessica Brody. The motion was approved unanimously (9-0).  <b>Staff Recommendation:</b> Staff recommends approval of up to \$45,000 from the South Platte Basin Account, \$45,000 from the Metro Account, and up to \$90,000 from the Statewide Account to help fund the project: South Platte Basin Salinity Study – Phase 2.
19b.	<b>Basin: Arkansas</b> <b>Applicant:</b> Lower Arkansas Valley Water Conservancy District <b>Name of Water Activity:</b> Headgate 199 Lining  <b>Action:</b> Report by CWCB staff member Kathryn Weismiller. A motion to approve the staff recommendation was made by Greg Felt, which was seconded by Jessica Brody. The motion was approved unanimously (9-0).  <b>Staff Recommendation:</b> Staff recommends approval of up to \$18,000 from the Arkansas Basin Account, and up to \$180,000 from the Statewide Account to help fund the project: Headgate 199 Lining.
19c.	<b>Basin: Arkansas</b> <b>Applicant:</b> Pueblo County <b>Name of Water Activity:</b> Italian and Suburban Lateral Water Improvement Project

	<p><b>Action:</b> Report by CWCB staff member Kathryn Weismiller. A motion to approve the staff recommendation was made by Greg Felt, which was seconded by Jessica Brody. The motion was approved unanimously (9-0).</p> <p><b>Staff Recommendation:</b> Staff recommends approval of up to \$46,400 from the Arkansas Basin Account and up to \$162,900 from the Statewide Account to help fund the project: Italian &amp; Suburban Lateral Water Improvement Project.</p>
19d.	<p><b>Basin:</b> Arkansas</p> <p><b>Applicant:</b> Round Mountain Water and Sanitation District</p> <p><b>Name of Water Activity:</b> Reservoir Feasibility Study &amp; Design</p> <p><b>Action:</b> Report by CWCB staff member Kathryn Weismiller. A motion to approve the staff recommendation was made by Greg Felt, which was seconded by Jessica Brody. The motion was approved unanimously (9-0).</p> <p><b>Staff Recommendation:</b> Staff recommends approval of up to \$15,500 from the Arkansas Basin Account, and up to \$155,000 from the Statewide Account to help fund the project: Reservoir Feasibility Study &amp; Design.</p>
19e.	<p><b>Basin:</b> Gunnison</p> <p><b>Applicant:</b> Cimarron Canal and Reservoir Company</p> <p><b>Name of Water Activity:</b> Fish Creek Reservoir #2 Repair and Conservation Project</p> <p><b>Action:</b> Report by CWCB staff member Kathryn Weismiller. A motion to approve the staff recommendation was made by Steve Anderson, which was seconded by Jessica Brody. The motion was approved unanimously (9-0).</p> <p><b>Staff Recommendation:</b> Staff recommends approval of up to \$50,000 from the Gunnison Basin Account, and up to \$88,900 from the Statewide Account to help fund the project: Fish Creek Reservoir #2 Repair &amp; Conservation Project.</p>
19f.	<p><b>Basin:</b> Metro</p> <p><b>Applicant:</b> Lookout Mountain Water District</p> <p><b>Name of Water Activity:</b> Upper Beaver Brook Reservoir SCADA System Project</p> <p><b>Action:</b> Report by CWCB staff member Kathryn Weismiller. A motion to approve the staff recommendation was made by Greg Felt, which was seconded by Jessica Brody. The motion was approved unanimously (9-0).</p> <p><b>Staff Recommendation:</b> Staff recommends approval of up to \$50,000 from the Metro Account, and up to \$100,000 from the Statewide Account to help fund the project: Upper Beaver Brook Reservoir SCADA System Project.</p>
19g.	<p><b>Basin:</b> Metro</p> <p><b>Applicant:</b> Colorado Nonprofit Development Center</p> <p><b>Name of Water Activity:</b> 10.10.10 Water &amp; Climate Program</p> <p><b>Action:</b> Report by CWCB staff member Kathryn Weismiller. A motion to approve the staff recommendation was made by Greg Felt, which was seconded by Jessica Brody. The motion was approved unanimously (9-0).</p> <p><b>Staff Recommendation:</b> Staff recommends approval of up to \$45,000 from the Metro Account to help fund the project: Water and Climate Program.</p>
19h.	<p><b>Basin:</b> Metro</p> <p><b>Applicant:</b> WaterReuse Colorado</p> <p><b>Name of Water Activity:</b> Direct Potable Reuse WQCD Stakeholder Process Facilitation</p>



	<p><b>Action:</b> Report by CWCB staff member Kathryn Weismiller. Laura Belanger with Western Resource Advocates addressed the Board. A motion to approve the staff recommendation was made by Greg Felt, which was seconded by Jessica Brody. The motion was approved unanimously (9-0).</p> <p><b>Staff Recommendation:</b> Staff recommends approval of up to \$50,000 from the Metro Account and up to \$49,800 from the Statewide Account to help fund the project: Direct Potable Reuse WQCD Stakeholder Process Facilitation.</p>
19i.	<p><b>Basin:</b> North Platte  <b>Applicant:</b> Owl Mountain Partnership  <b>Name of Water Activity:</b> Jackson County Water Structure Improvement Project #3</p> <p><b>Action:</b> Report by CWCB staff member Kathryn Weismiller. A motion to approve the staff recommendation was made by Curran Trick, which was seconded by Jim Yahn. The motion was approved unanimously (9-0).</p> <p><b>Staff Recommendation:</b> Staff recommends approval of up to \$66,612 from the North Platte Basin Account to help fund the project: Jackson County Water Structure Improvement Project #3.</p>
19j.	<p><b>Basin:</b> Rio Grande  <b>Applicant:</b> Colorado Rio Grande Restoration Foundation  <b>Name of Water Activity:</b> Conejos River Partnership Project – Phase 1</p> <p><b>Action:</b> Report by CWCB staff member Kathryn Weismiller. Daniel Boyes with Colorado Rio Grande Restoration Foundation addressed the Board. A motion to approve the staff recommendation was made by Heather Dutton, which was seconded by Jim Yahn. The motion was approved unanimously (9-0).</p> <p><b>Staff Recommendation:</b> Staff recommends approval of up to \$25,000 from the Rio Grande Basin Account, and up to \$225,000 from the Statewide Account to help fund the project: Conejos River Partnership Project – Phase 1.</p>
19k.	<p><b>Basin:</b> South Platte  <b>Applicant:</b> Colorado State University  <b>Name of Water Activity:</b> Sustaining Plains Aquatic Ecosystems Using an Integrated Ecological and Social Approach</p> <p><b>Action:</b> Report by CWCB staff member Kathryn Weismiller. A motion to approve the staff recommendation was made by Jim Yahn, which was seconded by Heather Dutton. The motion was approved unanimously (9-0).</p> <p><b>Staff Recommendation:</b> Staff recommends approval of up to \$40,000 from the South Platte Basin Account and up to \$94,015 from the Statewide Account to help fund the project: Sustaining Plains Aquatic Ecosystems using an Integrated Ecological and Social Approach.</p>
19l.	<p><b>Basin:</b> Southwest  <b>Applicant:</b> Fort Lewis College  <b>Name of Water Activity:</b> Dolores River Adaptive Management Project</p> <p><b>Action:</b> Report by CWCB staff member Kathryn Weismiller. Gigi Richard with Fort Lewis College addressed the Board. Celene Hawkins disclosed that her employer TNC is providing funding on this project. A motion to approve the staff recommendation was made by Jim Yahn, which was seconded by Jaclyn Brown. The motion was approved unanimously (9-0).</p>

	<p><b>Staff Recommendation:</b> Staff recommends approval of up to \$25,000 from the Southwest Basin Account and up to \$140,617 from the Statewide Account to help fund the project: Dolores River Adaptive Management Project.</p>
19m.	<p><b>Basin:</b> Southwest  <b>Applicant:</b> Morrison Consolidated Ditch Company  <b>Name of Water Activity:</b> Railroad Siphon Replacement Project</p> <p><b>Action:</b> Report by CWCB staff member Kathryn Weismiller. A motion to approve the staff recommendation was made by Jim Yahn, which was seconded by Jaclyn Brown. The motion was approved unanimously (9-0).</p> <p><b>Staff Recommendation:</b> Staff recommends approval of up to \$25,000 from the Southwest Basin Account, and up to \$33,875 from the Statewide Account to help fund the project: Railroad Siphon Replacement.</p>
19n.	<p><b>Basin:</b> Southwest  <b>Applicant:</b> ONWARD! Legacy Foundation, dba Montezuma Orchard Restoration Project  <b>Name of Water Activity:</b> Innovations in Irrigation To Support Heritage Apple Orchards in SW Colorado</p> <p><b>Action:</b> Report by CWCB staff member Kathryn Weismiller. Jude Schuenemeyer with Montezuma Orchard Restoration Project. Celene Hawkins disclosed that her employer TNC is providing funding on this project. A motion to approve the staff recommendation was made by Jim Yahn, which was seconded by Jaclyn Brown. The motion was approved unanimously (9-0).</p> <p><b>Staff Recommendation:</b> Staff recommends approval of up to \$25,000 from the Southwest Basin Account, and up to \$39,900 from the Statewide Account to help fund the project: Innovations in Irrigation to Support Heritage Apple Orchards in SW Colorado.</p>
19o.	<p><b>Basin:</b> Southwest  <b>Applicant:</b> Red Mesa Reservoir and Ditch Company  <b>Name of Water Activity:</b> Red Mesa Reservoir Project</p> <p><b>Action:</b> Report by CWCB staff member Kathryn Weismiller. Jordan Dimick, Mardi Gebhardt, and Trent Taylor with Red Mesa Reservoir &amp; Ditch Company addressed the Board. A motion to approve the staff recommendation was made by Jim Yahn, which was seconded by Jaclyn Brown. The motion was approved unanimously (9-0).</p> <p><b>Staff Recommendation:</b> Staff recommends approval of up to \$25,000 from the Southwest Basin Account, and up to \$250,000 from the Statewide Account to help fund the project: Red Mesa Reservoir Enlargement (Final Design and Permitting).</p>
20	<p><b>Water Project Loan/Grant</b>  <i>Finance Section</i></p>
20a.	<p><b>Florida Consolidated Ditch Company – Florida Canal Diversion Replacement</b></p> <p><b>Action:</b> Report by CWCB staff member Matt Stearns. Justin Catalano with Florida Ditch and Pete Foster with Wright Water Engineers addressed the Board. Celene Hawkins disclosed that her employer TNC has provided a letter of support for this project. A motion to approve the staff recommendation was made by Heather Dutton, which was seconded by Gail Schwartz. The motion was approved unanimously (9-0).</p>



**Staff Recommendation:** Staff Recommendation for CWCB Loan:

Staff recommends the Board approve a loan not to exceed \$757,500 (\$750,000 for Project costs and \$7,500 for the 1% service fee) to the Florida Consolidated Ditch Company for costs related to the Florida Canal Diversion Replacement Project, from the Severance Tax Perpetual Base Fund. The loan terms shall be 30 years at a blended interest rate of 1.30% per annum. Security for the loan shall be in compliance with CWCB Financial Policy #5.

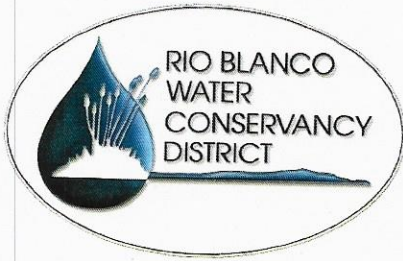
Staff Recommendation for WSRF Grant:

Staff recommends approval of up to \$250,000 from the Statewide Fund and \$25,000 from the Southwest Basin Fund to the Florida Consolidated Ditch Company for costs related to the Florida Canal Diversion Replacement Project.

**ADJOURN**

A motion to adjourn the September 2020 Board meeting was made by Heather Dutton, which was seconded by Gail Schwartz. The motion was approved unanimously (9-0).

## 8. Stakeholder comment letters



July 28, 2020

RE; Revisions to the Rules Concerning Colorado's Instream Flow and Natural Lake Level Program ("ISF Rules")

Attn; Linda Basse Instream Flow Program, CWCB

Dear Linda

The Rio Blanco Water Conservancy District (RBWCD) is supportive of the ISF program and fully understands the necessity, purpose, and value. The RBWCD is pleased to submit comments regarding the proposed rule changes to Colorado's Instream Flow Program. Some comments reflect the existing rules which the RBWCD felt inclusion of these comments is applicable to the overall proposed rule changes and should be included in at least context with the overall program. Please find our comments below.

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

RBWCD suggest including in context:

- (12) Evaluate and consider potential risk to downstream users.
- (13) review other existing or planned means available to meet ISF uses that fit into the particular regions or county of the proposed ISF water right that include local customs and cultures.
- (14) The ISF should be economically feasible and no injurious to the region where the ISF exist.
- (15) The ISF should demonstrate the ability to compliment and promote local customs and cultures while also demonstrating an economic benefit complimenting the specific regions existing economic structure.

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

*(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.*

RBWCD comment: Using alternate means such as storage should be considered first. This review should include how using water from storage could also provide secondary benefits to the water users and water way where the proposed ISF is contained. All ISF designations poses risk to other water users by limiting the development of water in a designated ISF reach.

**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. Renewable loans, **which can be used to preserve or improve the natural environment**, 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."*

RBWCD comment:

This section should including taking into consideration existing and future uses of water not limiting the ability of water development. In some case there has been 100% of available water set aside for and ISF limiting the ability of existing water rights form being developed. Additionally prior to any ISF being established it should eb verified the water is consistently available for the creation of an ISF.

**6k.2 (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.***

RBCWD comment: Without detriment to existing or ability to develop decreed water rights.



**6k.2 (d)** *For renewable loans to improve the natural environment to a reasonable degree the board will:*

*ii. **make findings on flow rates appropriate to improve** the natural environment to a reasonable degree with the loaned water*

RBWCD comment: Suggest including "sustain" within item ii. Loans should not include any form of agricultural land "dry-up". Present basin or drainage hydrology and water user operations specific to the basin should be considered reducing or eliminating unforeseen negative secondary impacts.

**6k.2 (h)** *At the end of or after the first ten-year period of a renewable loan, the applicant may reapply for a loan, and the State Engineer may approve such loan for an additional ten-year period. At the end of or after the second ten-year period of a renewable loan, the applicant may reapply for a loan, and the State Engineer may approve such loan for one additional ten-year period. 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 may hear public comment** and objections to the renewal 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).*

RBWCD comment: The Board "will or shall" should be exchange with "may". "May" is not definitive and the public needs to have opportunity to provide comment and objections.

**6k.(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.*

RBWCD comment: This rule is a bit unclear. Regardless RBWCD feel compelled to state; loan water should be included within other programs as outlined in this section taking into consideration the cumulative impacts of each program. Water in the stream is water in the stream.

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

**6m.(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.*

RBWCD comment; Adequate time should be permitted for local water users to review CWCB documents for the loans and potential risk the loans may have on the applicable stream and water users. A transparent that included ample opportunity for public input is critical to a successful ISF program.

**6m.(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.*

RBWCD comment: Should also include legal publication in the local newspaper of the ISF loan. Again, public input and transparency is critical to a successful ISF program.

The RWBCD anticipates review of the final rule and comments submitted about the Revisions to the Rules Concerning Colorado's Instream Flow and Natural Lake Level Program.

Please contact our office for further assist.

Sincerely,



Alden Vanden Brink

District Manager

Rio Blanco Water Conservancy District

**TODD M. STARR**  
**RIO BLANCO COUNTY ATTORNEY**  
**P.O. BOX 599**  
**MEEKER, CO 81641**



July 29, 2020

Colorado Water Conservation Board  
Linda Bassi *via email: linda.bassi@state.co.us*

RE: Revisions to the Rules Concerning Colorado's Instream Flow and Natural Lake Level  
Program ("ISF Rules")

Dear Ms. Bassi and Colorado Water Conservation Board Staff:

Please let me start by introducing myself. My name is Todd M. Starr and I am the Rio Blanco County, County Attorney. I have been instructed by the Board of County Commissioners of Rio Blanco County, Colorado, herein "County", to submit a number of comments on behalf of the County. The County understands the purpose and value of in stream flow rights. The County is pleased to submit comments regarding the proposed rule changes to Colorado's Instream Flow (ISF) Program.

While the County understands the purpose and value of ISF rights, we feel obligated to address an economic impact that is not typically considered in the acquisition/loan of ISF rights. We believe the State and its agencies should work with rural communities in a supporting role that will sustain the local economy which in turn helps the State economy. We hope the State and agencies realize that ISFs can and will place an undue burden on rural communities which are already economically challenged. ISF placed on a stream/river that is at or near full appropriations, limits the economic growth opportunities in the future by limiting the ability to file on and develop future water rights which could, in turn, help the local community grow. Therefore, it is imperative that the local community be engaged and their input weighs heavily on the decisions for the State to acquire and/or accept loans for ISFs.

**Appropriateness of Acquisition and/or Loans:**

The County appreciates the mentioning of return flows in the evaluation of Appropriateness of Acquisitions section. However, it appears to primarily focus on "whether an existing instream flow water right relies on return flows from the water right proposed of acquisition". The County respectfully requests this same consideration be given to the impacts on other water right holders that rely on return flows when considering acquisitions or loans. Even a one year "dry-up" could significantly impact the return flows. Additional consideration should be provided to address these issues.

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**Todd M. Starr, Rio Blanco County Attorney**  
Cell: (970) 749-0807    Fax: (970) 878-5731    Email: todd.starr@rbc.us  
Rio Blanco County Courthouse, 555 Main Street, P. O. Box 599, Meeker, CO 81641

It is also appreciated that the, “Potential material injury to existing decreed water rights” is noted as part of the consideration for appropriateness of acquisition. However, we would request that all notations in current and proposed rules which state: “*to preserve or improve the natural environment to a reasonable degree*” be modified to read, “*to preserve or improve the natural environment to a reasonable degree without detriment to existing or ability to develop decreed water rights*”.

The County requests that the CWCB improve its efforts to increase involvement from the local community in which these impacts may occur. The County appreciates being a part of the distribution list, which notifies the County officials of any ISF activity in Rio Blanco County. The County would like to see a direct notification to all water right holders which might potentially be impacted. In an age with GIS mapping, what once would have been difficult and time consuming can now be obtained with minimal effort.

We recognize that these ISF proposals typically come from BLM, CPW, and/or USFS State level staff. It is critically important that the local offices/staff of these agencies be involved in the initial consideration of an ISF rather than this effort being driven from the State offices. The County asks that the CWCB strongly encourage this to be a more locally led process. This would facilitate communication with the people who live in the area and are more likely to understand the larger picture of all the natural resources and the community and would be in a better position to determine the value and impacts of such actions.

The County respectfully requests that alternatives to ISF rights be evaluated in the analysis for acquisitions and/or loans. This could be considered in a process similar to how the federal agencies evaluate their options through the National Environmental Policy Act (NEPA). It would include, but not limited to; 1) the analysis of what additional water storage could provide at the critical time for additional water in the stream, 2) what impact the ISF right would have on the aquifer (forested or irrigated), and 3) the economic impact (positive and negative) the ISF would have on the community. The process would provide a greater opportunity to evaluate the pros and the cons of the ISF right, including the benefits it provides to fish and wildlife at that location and/or downstream.

Suggestion on 6k.2 (d): It should read, “make findings on flow rates appropriate to improve sustain the natural environment...” Present basin or drainage hydrology and water user operations specific to the basin should be considered to reduce or eliminate unforeseen negative secondary impacts.

Request on 6k.2 (h) The Board shall hear public comment and objections to the renewal at the public meeting. The public and specifically other water right holders deserve an opportunity to provide comment and objections.

Comment on 6k. (3). Clarification is required as the rule is a bit unclear. Loaned water should be included within other programs as outlined in this section taking into consideration the cumulative impacts of each program. However, the water right holder should only be compensated through one program while receiving credit for providing water to the stream.

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**Todd M. Starr, Rio Blanco County Attorney**

Cell: (970) 749-0807      Fax: (970) 878-5731      Email: [todd.starr@rbc.us](mailto:todd.starr@rbc.us)

Rio Blanco County Courthouse, 555 Main Street, P. O. Box 599, Meeker, CO 81641



Comment on 6m. (a): Transparency which includes ample opportunity for public input is critical to a successful ISF program. Adequate notification and time should be permitted for local water users to review CWCB documents for the loans and potential risk the loans may have on the applicable stream and water users.

Comment on 6m. (c) This rule should also include legal publication in the newspaper of local circulation in the community affected by the ISF loan. Public input and transparency is critical to a successful ISF program.

The County looks forward to review of the final rule and comments submitted about the Revisions to the Rules Concerning Colorado's Instream Flow and Natural Lake Level Program.

Sincerely,



Todd M. Starr  
Rio Blanco County, County Attorney



**COLORADO WATER TRUST**

3264 Larimer Street, Suite D, Denver, CO 80205

Tel: 720.570.2897 | [www.coloradowatertrust.org](http://www.coloradowatertrust.org)

To: linda.bassi@state.co.us

Re: Comments of the Colorado Water Trust on Proposed Revisions to the Rules Concerning Colorado's Instream Flow and Natural Lake Level Program

July 29, 2020

Dear Ms. Bassi,

Thank you for distributing the proposed revisions to the Rules Concerning Colorado's Instream Flow and Natural Lake Level Program ("ISF Rules"). The following comments are prepared on behalf of the Colorado Water Trust ("Water Trust"). The Colorado Water Trust is a statewide nonprofit organization that works collaboratively with partners all across Colorado on restoring flow to Colorado's rivers in need using solutions that benefit both the people we work with and Colorado's rivers. Since 2001, the Water Trust has restored 12 billion gallons of water to rivers and streams across the state.

The Water Trust has one comment regarding a section of the rules that aims to address the rulemaking requirements of H.B. 20-1157. In the context of making this comment, the Water Trust wishes to emphasize that the temporary instream flow loan program that is the subject of H.B. 20-1157 is a streamflow restoration tool that the Water Trust has used extensively in the past. The Water Trust has worked with water right owners on the Yampa River and Beaver Creek in Division 6; Tomichi Creek and the Little Cimarron River in Division 4; and Deep Creek, the Fraser River, and Willow Creek in Division 5 to gain temporary administrative approval for the use of water rights for instream flow purposes. The temporary instream flow loan program restores flows to Colorado's rivers in need, all the while protecting other water rights from injury, and our comments in this letter and throughout the remainder of this rulemaking process will continue to aim towards this goal.

The Water Trust would like to see a modification to proposed rule 6(k)(2)(h) on page 6 of the July 21, 2020 CWCB Staff Draft ("7/21 Draft"). The 7/21 Draft states in part:





**COLORADO WATER TRUST**

3264 Larimer Street, Suite D, Denver, CO 80205

Tel: 720.570.2897 | [www.coloradowatertrust.org](http://www.coloradowatertrust.org)

(h) At the end of or after the first ten-year period of a renewable loan, the applicant may reapply for a loan, and the State Engineer may approve such loan for an additional ten-year period. At the end of or after the second ten-year period of a renewable loan, the applicant may reapply for a loan, and the State Engineer may approve such loan for one additional ten-year period. 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 Water Trust would like to see changes to the underlined text so it is clear that an applicant may reapply for a second or third ten-year term before the end of a first or second ten-year term. That will enable an applicant to enter into subsequent temporary loans without interruption. The Water Trust suggests using the language that H.B. 20-1157 established for CRS 37-83-105(2)(a)(IV)(A) for this clarification, replacing the underlined language such that rule 6(k)(2)(h) would read as follows:

(h) An applicant may reapply for a loan and the state engineer may approve a renewable 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.[...]

Thank you for your consideration. We look forward to participating in the August 3 conference and providing further input on the proposed ISF rules.

Sincerely,

Kate Ryan

Senior Staff Attorney





*Promoting the wise use of all natural resources*

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July 29, 2020

RE: Revisions to the Rules Concerning Colorado's Instream Flow and Natural Lake Level Program ("ISF Rules")

Attn: Linda Basse Instream Flow Program, CWCB

Ms. Basse,

Thank you for the opportunity to submit comments regarding the proposed rule changes to Colorado's Instream Flow (ISF) Program.

The White River and Douglas Creek Conservation Districts (Districts) are political subdivisions of the State of Colorado. The Districts' authorities, power, and structure are contained in the Colorado Revised Statutes, Title 35, Article 70. The Districts promote the wise use of natural resources through information, education, and technical assistance. The Districts work and partner with local, state, and federal/national entities to implement on-the-ground conservation utilizing local expertise and knowledge.

The Districts understand the purpose and value of ISF rights. However, we feel obligated to address an economic impact that is not typically considered in the acquisition/loan of ISF rights. We believe the State and its agencies should work with rural communities in a supportive role that will sustain the local economy and environment which in turn helps the State economy and citizens' quality of life. We ask the State and respective agencies realize that ISFs can and will place additional challenges on rural communities that are already economically challenged. ISF placed on a stream/river that is at or near full appropriations, limits economic growth opportunities for their future by limiting the ability to file on and develop future water rights which could help the local community grow. Therefore, you will see a multiple requests in the below comments for the local community to be heavily engaged and respected in the decisions for the State to acquire and/or accept loans for ISFs.

### ***Appropriateness of Acquisition and/or Loans:***

The Districts appreciate the mentioning of return flows in the evaluation of Appropriateness of Acquisitions section. However, it appears to primarily focus on “whether an existing instream flow water right relies on return flows from the water right proposed of acquisition”. The Districts respectfully request this same consideration be given to the impacts on other water right holders that rely on return flows when considering acquisitions or loans. Even a one year “dry-up” could significantly impact the return flows for others and we are concerned if this is given enough consideration in the current processes.

It is also appreciated that the, “Potential material injury to existing decreed water rights” is noted as part of the consideration for appropriateness of acquisition. However, we would request that in all notations in current and proposed rules stating “***to preserve or improve the natural environment to a reasonable degree***” read, “***to preserve or improve the natural environment to a reasonable degree without detriment to existing rights or ability to develop decreed water rights***”.

The Districts ask that the CWCB require much greater involvement from the local community in which these impacts may occur than has been done in the past. The Districts appreciate being a part of your distribution list that now notifies us of any ISF activity in Rio Blanco County. Is there an opportunity to directly notify all water right holders that could potentially be impacted?

We recognize that these ISF proposals typically come from BLM, CPW, and/or USFS State level staff. It is critically important that the local offices/staff of these agencies be involved in the initial consideration of an ISF rather than this effort being driven from the State offices. The Districts ask that the CWCB strongly encourage this to be a more locally led process so that people who live in the area and are more likely to understand the larger picture of all the natural resources and the community can determine the value and impacts. We would suggest a “hearing” type of opportunity be held within the County in which the ISF is proposed. This should occur before it is moved to the CWCB and the representative to the CWCB from that area be requested to attend.

The Districts respectfully request that alternatives to ISF rights be evaluated in the analysis for acquisitions and/or loans. This could be considered in a process similar to how the federal agencies evaluate their options through the National Environmental Policy Act (NEPA). It would include, but not limited to; 1) the analysis of what additional water storage could provide at the critical time for additional water in the stream, 2) what impact the ISF right would have on the aquifer (forested or irrigated), 3) the economic impact (positive and negative) the ISF would have on the community, and 4) study current basin or drainage hydrology and water user

operations specific to the basin. If this process was followed, it would reduce unforeseen negative secondary impacts and provide a greater opportunity to evaluate the pros and the cons of the ISF right including the benefits it provides to fish and wildlife at that location and/or downstream.

Suggestion on **6k.2(d)**: It should read, "*make findings on flow rates appropriate to improve sustain the natural environment...*".

Request on **6k.2 (h)** *The Board ~~may~~ shall hear public comment and objections to the renewal at the public meeting.* The local public and specifically other water right holders in the area deserve an opportunity to provide comment and objections.

Comment on **6k.(3)**. The rule is a bit unclear. Loaned water should be included within other programs as outlined in this section taking into consideration the cumulative impacts of each program. However, the water right holder should only be compensated through one program while receiving credit for providing water to the stream.

Comment on **6m.(a)**: Transparency which includes ample opportunity for public input is critical to a successful ISF program. Adequate notification and time should be permitted for local water users to review CWCB documents for the loans and potential risk the loans may have on the applicable stream and water users. Again, a local hearing would be beneficial for this effort.

Comment on **6m.(c)** This rule should also include legal publication in the local newspaper of the ISF loan. Public input and transparency is critical to a successful ISF program.

The White River and Douglas Creek Conservation Districts look forward to review of the final rule and comments submitted about the Revisions to the Rules Concerning Colorado's Instream Flow and Natural Lake Level Program.

Please contact our office with any questions.

Sincerely,



Callie Hendrickson, Executive Director



STATE OF  
COLORADO

Bassi - DNR, Linda <linda.bassi@state.co.us>

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## ISL rules update

1 message

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**Jan Crawford** <jdchda@gojade.org>

Wed, Jul 29, 2020 at 10:07 AM

To: Linda Bassi <linda.bassi@state.co.us>

Cc: Executive Director <executivedirector@headwatersalliance.org>, Tom Tichy <tomtichy1@gmail.com>, Randy McClure <hardrockenterprises@gmail.com>, Christi Bode <christi@moxiecranmedia.com>, Therese <tmhargraves@gmail.com>

Ms. Bassi,

In the conversations on instream flow rules, please consider the economics associated with instream flows and nonconsumptive water uses in general.

Nonconsumptive uses support a water recreation industry in Colorado that is roughly comparable to that of our ag economy in terms of number of jobs (direct and indirect), economic activity, household income, state GDP, and tax revenues, all without significant negative impacts to wildlife, natural habitat, climate change or quality of life for most of our population. Nonconsumptive use does not detract from Colorado's ability to comply with Rio Grande and Colorado Compact commitments.

For these financial reasons alone, instream flow rules should make it easier, not harder, to keep more water in our streams, particularly in dry years, and particularly in parts of the state where rural economies are increasingly focused on recreation and tourism.

Thanks for your work, never easy or non-controversial, in dealing responsibly with this important issue.

Jan Crawford

STATE OF  
COLORADO

Bassi - DNR, Linda &lt;linda.bassi@state.co.us&gt;

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## Comments re ISF Rules

1 message

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**Bill Wombacher** <wwombacher@nswlaw.com>  
To: "linda.bassi@state.co.us" <linda.bassi@state.co.us>

Wed, Jul 29, 2020 at 4:53 PM

Linda,

Below are initial comments on behalf of ACWWA, ECCV, United, and Legacy Water regarding the proposed ISF rules:

1. Why was the phrase "or rejects" deleted from 6k.(1)(e)? This seems to suggest that rejection is no longer a possible outcome.
2. C.R.S. 37-83-105(2)(a)(V) allows parties to submit comments by January 1 for each year that a loan is exercised. As described in that same subsection, a comment letter triggers a requirement to repeat the process described in (2)(b). This process and the extent to which the CWCB is involved in the 2(b) process that occurs after a comment is submitted should be described in the rules. 6k.(2)(g) may be the best location to add this information.
3. To ensure consistency with C.R.S. 37-92-102(3)(c.5), Section 6a should be revised to confirm that the water, water rights, or interests in water obtained for ISF purposes cannot be derived from conditional water rights.

We reserve the right to provide additional comments as this process proceeds.

Bill

William D. Wombacher

**Nazarenus Stack & Wombacher LLC**

8301 E. Prentice Ave. Suite 110

Greenwood Village, CO 80111

Office: 720-647-5661

Direct: 720-506-9602

[wwombacher@nswlaw.com](mailto:wwombacher@nswlaw.com)

[www.nswlaw.com](http://www.nswlaw.com)







STATE OF  
COLORADO

Ricotta - DNR, Kimberly <kimberly.ricotta@state.co.us>

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## Fwd: Aurora Comments to Proposed Rules

1 message

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**Linda Bassi - DNR** <linda.bassi@state.co.us>

Fri, Aug 14, 2020 at 7:02 PM

To: Kaylea White <Kaylea.White@state.co.us>, Jen Mele <Jen.Mele@coag.gov>, Kim Ricotta <Kimberly.Ricotta@state.co.us>, susanj.schneider@state.co.us, Marc Sarmiento <Marc.Sarmiento@coag.gov>

Sent from my iPhone

Begin forwarded message:

**From:** "Fowler, Erich" <esfowler@auroragov.org>

**Date:** August 14, 2020 at 6:45:49 PM MDT

**To:** Linda Bassi <Linda.Bassi@state.co.us>

**Subject:** Aurora Comments to Proposed Rules

Hello Linda,

Below are Aurora's initial comments to the proposed rules:

1. One of the factors for consideration under Section 6e should include the presently decreed use parameters, including, but not limited to, time of use, amount of use, and types of use.
2. The opening redlines in Section 6k should specify that the Board accept temporary loans of water for ISF use pursuant to a decreed CWCB instream flow right.

Erich S. Fowler

Water Resources Specialist – South Platte Basin Program | City of Aurora | Aurora Water

Office 303-739-7467



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September 3, 2020

Linda Bassi  
Colorado Water Conservation Board  
1313 Sherman Street, Room 718  
Denver, CO 80203  
linda.bassi@state.co.us

**Subject: Comments on Proposed Revisions to the Rules Concerning Colorado's Instream Flow and Natural Lake Level Program**

Dear Ms. Bassi,

On behalf of the Upper Yampa Water Conservancy District (UYWCD) Board of Directors and staff, I would like to express our gratitude to Representative Dylan Roberts, Senator Kerry Donovan, Representative Perry Will, and the Colorado Water Conservation Board (CWCB) for your diligent work in helping to pass House Bill 20-1157.

The UYWCD looks forward to working on longer-term solutions to support the Yampa River during low flows using HB20-1157 and sincerely appreciates the work of the CWCB staff in drafting proposed revisions to the Rules Concerning Colorado's Instream Flow and Natural Lake Level Program (ISF Rules). We have carefully reviewed the proposed revisions and understand the importance of addressing the rulemaking requirements of HB20-1157. As such, UYWCD asks that CWCB staff consider the following remarks as they work through the next draft of proposed revisions to the ISF Rules.

The UYWCD respectfully requests an addition to proposed rule 6(k)(2)(a) on page 6 of the August 13, 2020 CWCB Staff Draft ("8/13 Draft"). The 8/13 Draft states:

*(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.*



The UYWCD suggests that some of the language included in rule 6(k)(1)(d) be included in 6(k)(2)(a) to read as follows:

- (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. **The CWCBC's use of loaned water for instream flows shall not exceed the extent of the CWCBC'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.***

The UYWCD suggests that the requested change will add clarity to the limits of use for Renewable Loans and is consistent with the language contained in HB20-1157 established for CRS 37-83-105(1)(b)(I) and (II):

(b) THE OWNER OF ANY DECREED WATER RIGHT MAY LOAN WATER TO THE COLORADO WATER CONSERVATION BOARD FOR USE AS INSTREAM FLOWS:

(I) To PRESERVE THE NATURAL ENVIRONMENT TO A REASONABLE DEGREE PURSUANT TO A DECREED INSTREAM FLOW WATER RIGHT HELD BY THE BOARD; OR

(II) To IMPROVE THE NATURAL ENVIRONMENT TO A REASONABLE DEGREE FOR A STREAM REACH FOR WHICH THE BOARD HOLDS A DECREED INSTREAM FLOW WATER RIGHT.

In addition, the UYWCD respectfully requests an addition to proposed rule 6(k)(2)(d)(i) on page 6 of the August 13, 2020 CWCBC Staff Draft ("8/13 Draft"). The 8/13 Draft states:

(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; [..]*



The UYWCD suggests that some of the language included in rule 6(k)(1)(d) be included in 6(k)(2)(a) to read as follows:

*(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 will review any other biological or scientific evidence presented to the Board; [..]*

The UYWCD looks forward to further review of the final rule and comments submitted about the Revisions to the ISF Rules. Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Andy", followed by a small horizontal line.

Andy Rossi, P.E.  
General Manager

[arossi@upperyampawater.com](mailto:arossi@upperyampawater.com)

## Document: C.R.S. 37-83-105

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### C.R.S. 37-83-105

#### Copy Citation

Current through all laws passed during the 2020 Legislative Session

**CO - Colorado Revised Statutes Annotated    TITLE 37. WATER AND IRRIGATION    WATER RIGHTS AND IRRIGATION    WATER RIGHTS - GENERALLY    ARTICLE 83. EXCHANGE OF WATER**

#### 37-83-105. Owner may loan agricultural water right - loans to Colorado water conservation board for instream flows - rules

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**(1)** (a) Subject to the limitations of this subsection (1) and pursuant to the procedures set forth in subsection (2)(b) of this section that apply to an expedited loan described in subsection (2)(a)(III.7) of this section, the owner of a water right decreed and used solely for agricultural irrigation purposes may loan all or a portion of the water right to another owner of a decreed water right on the same stream system and that is used solely for agricultural irrigation purposes for no more than one hundred eighty days during any one calendar year if the state engineer approves the loan in advance and the loan does not cause injury to other decreed water rights.

**(b)** The owner of any decreed water right may loan water to the Colorado water conservation board for use as instream flows:

**(I)** To preserve the natural environment to a reasonable degree pursuant to a decreed instream flow water right held by the board; or

**(II)** To improve the natural environment to a reasonable degree for a stream reach for which the board holds a decreed instream flow water right.

**(2)** (a) Water may be used for instream flows pursuant to a loan authorized under this section for a period not to exceed one hundred twenty days in a single calendar year, subject to the following:

**(I)** Prior to accepting the loan, the Colorado water conservation board shall compile a statement about the duration of the loan, a description of the original points of diversion, and other relevant information sufficient for the state engineer to determine that such loan does not injure existing decreed water rights.

**(II)** Consistent with current law, only the Colorado water conservation board is entitled to hold instream flow water rights and may accept proposed loans in accordance with section 37-92-102 (3).

**(III)** The loan shall not be accepted unless the state engineer determines that the Colorado water conservation board's temporary instream flow use will not injure existing water rights of others.

**(III.5)** Water rights loaned pursuant to this section 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.

**(III.7)** An expedited loan approved to preserve the natural environment to a reasonable degree pursuant to this subsection (2)(a) has a term of up to one year. The loan period begins when the state engineer approves the expedited loan. If an expedited loan is approved, the applicant shall not reapply for an additional expedited loan of the water right.

**(IV)** (A) A renewable loan approved to preserve or improve the natural environment to a reasonable degree pursuant to this subsection (2)(a) 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. The ten-year period begins when the state engineer approves the loan. An applicant may reapply for and the state engineer may approve a renewable loan pursuant to this subsection (2)(a) for up to two additional ten-year periods.

**(B)** If an applicant had previously been approved for and had exercised an expedited loan pursuant to subsection (2)(a)(III.7) of this section and subsequently applies and is approved for a renewable loan, the one-year loan period of the expedited loan counts as the first year of the five-year allowance for the subsequent renewable loan.

**(C)** In each year that a renewable loan is exercised, the applicant shall provide the written notice described in subsection (2)(b)(II) of this section.

**(V)** A party may file comments concerning potential injury to the party's water rights or decreed conditional water rights due to the operations of the loan of the water right with the state engineer by January 1 of the year following each year that the loan is exercised. The procedures of subsection (2)(b) of this section regarding notice, opportunity to comment, the state engineer's decision, and an appeal of the decision shall again be followed with regard to the party's comments. In an appeal to the water judge in the applicable water division of the determination made by the state engineer pursuant to this section, the applicant has the burden of proof that the loaned water right does not cause injury to other vested or conditionally decreed water rights. Any appeal of a decision by the state engineer concerning the loan pursuant to this section shall be made in accordance with the procedures set forth in subsection (2)(b) (VIII) of this section.

**(VI)** Rules promulgated by the Colorado water conservation board pursuant to subsection (3) of this section.

**(b)** In determining whether injury will occur, the state engineer shall ensure that the following conditions are met:

**(I)** The applicant has filed a request for approval of the loan with the state engineer, together with a filing fee in the amount of three hundred dollars. The state engineer shall transmit the fee to the state

treasurer, who shall deposit the fee in the water resources cash fund created in section 37-80-111.7 (1).

The request for approval must include:

- (A)** Evidence of the proponent's legal right to use the loaned water right;
  - (B)** A statement of the duration of the proposed loan;
  - (C)** A description of the original points of diversion, the return flow pattern, the stream reach, and the time, place, and types of use of the loaned water right;
  - (D)** A description of the new proposed points of diversion, the return flow pattern, the stream reach, and the time, place, and types of use of the loaned water right; and
  - (E)** A reasonable estimate of the historic consumptive use of the loaned water right;
- (II)** The applicant has submitted proof to the state engineer, in a form and manner determined by the state engineer, demonstrating that the applicant provided written notice of the request for approval of the loan by first-class mail or electronic mail to:
- (A)** 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
  - (B)** 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.
- (II.5)** The applicant has proven that the loan will not injure decreed water rights, decreed exchanges of water, or other water users' undecreed existing exchanges of water to the extent that the undecreed existing exchanges have been administratively approved before the date of the filing of the request for approval of the loan.
- (III)** The proposed use of the loaned water right is for agricultural irrigation purposes or for instream flow purposes by the Colorado water conservation board;
- (IV)** None of the water rights involved in the loan are adjudicated to or diverted at a well located more than one hundred feet from the bank of the nearest flowing stream;
- (V)** The state engineer has given the owners of water rights and decreed conditional water rights the opportunity to file comments on the proposed loan within the relevant time frame indicated in this subsection (2)(b)(V). The comments must include any claim of injury or any terms and conditions that should be imposed upon the proposed loan to prevent injury to a party's water rights and any other information the commenting party wishes the state engineer to consider in reviewing the proposed loan. The state engineer shall provide the parties entitled to notice under subsection (2)(b)(II) of this section:
- (A)** Fifteen days after the date of mailing of notice for expedited loans authorized under subsection (2)(a)(III.7) of this section to provide comments on the proposed loan; and
  - (B)** Sixty days after the date of mailing of notice for renewable loans authorized under subsection (2)(a)(IV) of this section to provide comments on the proposed loan.
- (VI)** The state engineer, after consideration of any comments received, has determined that the operation and administration of the proposed loan will not cause injury to other decreed water rights, decreed exchanges, or undecreed exchanges as described in subsection (2)(b)(II.5) of this section and, for loans made pursuant to subsection (2)(a) of this section, will not affect Colorado's compact

entitlements. The state engineer shall impose such terms and conditions as are necessary to ensure that



these standards are met. In making the determinations specified in this subsection (2)(b)(VI), the state

engineer need not hold any formal hearings or conduct any other formal proceedings, but may conduct a hearing or formal proceeding if the state engineer finds it necessary to address the issues.

**(VII)** The state engineer shall approve or deny the proposed loan within ten days after the period for comments on the proposed loan specified in subsection (2)(b)(V) of this section has expired.

**(VIII)** When the state engineer approves or denies a proposed loan, the state engineer shall serve a copy of the decision on all parties to the application by first-class mail or, if the parties have so elected, by electronic mail. Neither the approval nor the denial by the state engineer creates any presumptions or serves as a defense in any legal action that may be initiated concerning the loan. A party may file an appeal of a decision by the state engineer concerning the loan pursuant to this section to the water judge in the applicable water division within fifteen days after the date that the state engineer, following the state engineer's consideration of any comments submitted pursuant to subsection (2)(a)(V) of this section, serves the decision on the parties to the application. The applicant has the burden of proof to demonstrate that the loaned water right does not cause injury to other vested or conditionally decreed water rights, decreed exchanges, or undecreed exchanges as described in subsection (2)(b)(II.5) of this section. The water judge shall hear and determine the appeal on an expedited basis using the procedures and standards set forth in section 37-92-304 (3) concerning matters rereferred to the water judge by the water referee.

**(c)** All periods of time during which a loaned water right is used by the board for instream flow purposes shall be excluded from any historic consumptive use analysis of the loaned water right required under any water court proceeding.

**(3)** The Colorado water conservation board shall promulgate rules regarding the following necessary steps for its review and acceptance of loans for instream flow use pursuant to subsection (1)(b)(II) of this section:

**(a)** The board's review of the proposed loan, including a requirement that the board request and review a biological analysis from the division of parks and wildlife concerning the extent to which the proposed loan will improve the natural environment to a reasonable degree;

**(b)** A requirement that when considering a proposed loan, the board shall give preference to loans of stored water, when available, over loans of direct flow water; and

**(c)** The board's determination, after a hearing on the matter, if requested, whether to accept the proposed loan.

## History

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**Source:** L. 1899: p. 236, § 3. R.S. 08: § 3232. C.L. § 1712. CSA: C. 90, § 110. CRS 53: § 147-6-5.

**C.R.S. 1963:** § 148-6-5. **1993:** Entire section amended. **1996:** § 1, effective June 5. **2004:** (1)

**C.R.S. 1903:** § 140-0-0. **L. 2003:** Entire section amended, p. 2390, § 1, effective June 3. **L. 2004:** (1), IP(2)(b), (2)(b)(III), (2)(b)(VI), and (2)(b)(VII) amended, p. 1014, § 1, effective May 21. **L. 2005:** IP(2)(a) amended and (2)(a)(IV) and (2)(a)(V) added, p. 82, § 1, effective August 8. **L. 2007:** (2)(c) added, p. 48, § 1, effective August 3. **L. 2012:** IP(2)(b)(I) amended, (SB 12-009), ch. 197, p. 792, § 6, effective July 1. **L. 2020:** (1), IP(2)(a), (2)(a)(IV), (2)(a)(V), IP(2)(b), IP(2)(b)(I), (2)(b)(II), (2)(b)(V), (2)(b)(VI), (2)(b)(VII), and (2)(b)(VIII) amended and (2)(a)(III.5), (2)(a)(III.7), (2)(a)(VI), (2)(b)(II.5), and (3) added, (HB 20-1157), ch. 52, p. 179, § 1, effective September 14.

## ▼ Annotations

### Notes

**Editor's note:** Section 2 of chapter 52 (HB 20-1157), Session Laws of Colorado 2020, provides that the act changing this section applies to conduct occurring on or after September 14, 2020.

### Case Notes

#### ANNOTATION

**Law reviews.** For article, "The Effect of Water Law on the Development of Oil Shale", see 58 Den. L.J. 751. For article, "Water Banking: A New Tool For Water Management", see 23 Colo. Law. 595 (1994). For article, "Private Means to Enhance Public Streams", see 33 Colo. Law. 69 (April 2004).

**The parties who are concerned in the exchange, the lender and the borrower, must each and all be the owners** of rights to the use of water for irrigation. *Ft. Lyon Canal Co. v. Chew*, 33 Colo. 392, 81 P. 37 (1905).

**If this section had purported to create rights which did not theretofore exist, or if it was to be interpreted** as permitting exchanges or loans of water without reference to the rights of other appropriators, it could not be upheld as a valid legislative enactment. *Ft. Lyon Canal Co. v. Chew*, 33 Colo. 392, 81 P. 37 (1905).

**This section does not apply to a rotational no-call agreement because such an agreement does not loan a water right;** rather, each party to the agreement diverts pursuant to its own decreed priority with the senior water right holders simply forbearing from asserting their priority. *LoPresti v. Brandenburg*, 267 P.3d 1211 (Colo. 2011).

**The provisions of this section only permit an exchange or loan of water** under conditions which do not injuriously affect the vested rights of other appropriators. *Bowman v. Virdin*, 40 Colo. 247, 90 P. 506 (1907).

**Under this section a complaint is fatally defective in an action to restrain defendants from interfering with plaintiff** using water loaned to him by other appropriators, which fails to allege that the water so loaned can and will be used by plaintiff without impairing the vested rights of defendants owning later priorities. *Bowman v. Virdin*, 40 Colo. 247, 90 P. 506 (1907).

**This section seems to recognize a temporary exchange or loan of water without first obtaining a decree.** *Ft. Lyon Canal Co. v. Chew*, 33 Colo. 392, 81 P. 37 (1905).

**Such right is subject to the qualification of impairing vested rights.** *Ft. Lyon Canal Co. v. Chew*, 33 Colo. 392, 81 P. 37 (1905).

COLORADO REVISED STATUTES

**Content Type:**

**Terms:**

**Narrow By:** -None-

**Date and Time:** Dec 14, 2020 06:01:13 p.m. EST



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# Colorado Register



**43 CR 20**

**Volume 43 , No. 20**

**October 25, 2020**

# Introduction

The *Colorado Register* is published pursuant to C.R.S. 24-4-103(11) and is the sole official publication for state agency notices of rule-making, proposed rules, attorney general's opinions relating to such rules, and adopted rules. The register may also include other public notices including annual departmental regulatory agendas submitted by principal departments to the secretary of state.

"Rule" means the whole or any part of every agency statement of general applicability and future effect implementing, interpreting, or declaring law or policy or setting forth the procedure or practice requirements of any agency. "Rule" includes "regulation". C.R.S. 24-4-102(15). Adopted rules are effective twenty days after the publication date of this issue unless otherwise specified.

The *Colorado Register* is published by the office of the Colorado Secretary of State twice monthly on the tenth and the twenty-fifth. Notices of rule-making and adopted rules that are filed from the first through the fifteenth are published on the twenty-fifth of the same month, and those that are filed from the sixteenth through the last day of the month are published on the tenth of the following month. All filings are submitted through the secretary of state's electronic filing system.

For questions regarding the content and application of a particular rule, please contact the state agency responsible for promulgating the rule. For questions about this publication, please contact the Administrative Rules Program at [rules@sos.state.co.us](mailto:rules@sos.state.co.us).

# Notice of Proposed Rulemaking

**Tracking number**

2020-00812

**Department**

400 - Department of Natural Resources

**Agency**

408 - Colorado Water Conservation Board

**CCR number**

2 CCR 408-2

**Rule title**

RULES CONCERNING THE COLORADO INSTREAM FLOW AND NATURAL LAKE  
LEVEL PROGRAM

**Rulemaking Hearing****Date**

01/26/2021

**Time**

09:00 AM

**Location**

Via video conference, see <https://cwcb.colorado.gov>

**Subjects and issues involved**

The proposed revisions to the Rules will update: (1) the reference to the Boards website in Rule 4c.; and (2) references to Colorado Parks and Wildlife throughout the Rules. The revisions also amend Rules 6k. and 6m. to implement House Bill 20-1157, which addresses temporary loans of water for instream flow use.

**Statutory authority**

Sections 37-60-108, 37-83-105(3), and 37-92-102(3), C.R.S. (2020)

**Contact information****Name**

Linda Bassi

**Title**

Chief, Stream and Lake Protection Section, CWCB

**Telephone**

(303) 866-3441 X3204

**Email**

[linda.bassi@state.co.us](mailto:linda.bassi@state.co.us)

## 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 prepare and submit 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 provide 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~~ 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.**

...

**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.**

...

**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:

...

- (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 CPW~~DOW~~) 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.

...

- (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 CPW~~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.

...

- (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:

...

- iii. A provision allowing CWCB or CPW~~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);

#### **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.



## **NOTICE OF PUBLIC RULEMAKING HEARING BEFORE THE COLORADO WATER CONSERVATION BOARD**

### **I. NATURE OF PUBLIC RULEMAKING HEARING**

Pursuant to section 24-4-103, C.R.S., this is a notice of a public rulemaking hearing before the Colorado Water Conservation Board (“Board”) for consideration of amendments to the Board’s Rules Concerning the Colorado Instream Flow and Natural Lake Level Program, 2 CCR 408-2 (“Rules”). The amendments primarily affect Rule 6k. (Temporary Loans of Water to the Board) and Rule 6m. (Public Input on Proposed Acquisitions).

The Board is amending the Rules to: (1) address the requirements of House Bill 20-1157; (2) update a reference to the Board’s website; and (3) update references to Colorado Parks and Wildlife (“CPW”).

### **II. DESCRIPTION OF THE SUBJECTS AND ISSUES INVOLVED**

HB 20-1157 amends section 37-83-105, C.R.S. (2019), which governs temporary loans of water for instream flow (“ISF”) use. Among other things, HB 20-1157 directs the Board to promulgate rules to implement certain provisions of the bill.

Board Staff (“Staff”) drafted proposed changes to the Rules, solicited written comments from interested parties, and held public (a.k.a. stakeholder) meetings on August 3 and August 18, 2020, to allow interested parties to provide input on the proposed changes. At its September 16, 2020 meeting, the Board appointed a hearing officer and authorized Staff and the Hearing Officer to proceed with the formal rulemaking process. The formal rulemaking process is initiated by filing a notice of rulemaking hearing with the Secretary of State and publication in the Colorado Register.

Staff will retain a record of the rulemaking pursuant to section 24-4-103(8.1), C.R.S. The initial proposed rule amendments submitted to the Secretary of State are available on the Board’s website.

The proposed revisions to the Rules update: (1) the reference to the Board’s website in Rule 4c.; and (2) references to CPW throughout the Rules. The revisions also amend Rules 6k. and 6m. to implement HB 20-1157, and include:

- A. Definitions of expedited and renewable loans. The proposed amendments describe the two different types of loans, the requirements for each type of loan application, notice requirements and allowed ISF uses of loaned water for each type of loan, and the Board Director’s delegated authority for each type of loan;
- B. Procedures for evaluating and requesting approval of expedited loans, and for Board review and potential ratification of the Board Director’s decision on such loans;
- C. For renewable loans, the Board process for reviewing, receiving public input on, and directing Staff on whether to move forward with a proposed renewable loan, including a hearing under Rule 6m.(5), if requested. The proposed amendments to

- the Rules also describe the steps the Board must take for renewable loans that would improve the natural environment to a reasonable degree, including requesting and reviewing a biological analysis from CPW on the extent to which the proposed loan will improve the natural environment to a reasonable degree, and giving preference for loans of stored water, when available, over loans of direct flow water;
- D. Board consideration of potential injury to decreed water rights, decreed exchanges of water, or 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;
  - E. Staff process for coordinating with a water rights owner on requesting approval from the State Engineer of a proposed renewable loan (after Board review and decision);
  - F. Process for Board review and approval of renewing a loan for a second or third ten-year period; and
  - G. Notice requirements for hearings on renewable loans.

The language of the proposed amendments to the Rules, and a proposed statement of basis and purpose and specific statutory authority for the amendments, are available on the Board's website at <https://cwcb.colorado.gov/instream-flow-rules-revisions-hb-20-1157>, and are available upon request of Staff. Please contact Linda Bassi at (303) 866-3441, extension 3204 or at [linda.bassi@state.co.us](mailto:linda.bassi@state.co.us) for further information.

### III. SPECIFIC STATUTORY AUTHORITY

The statutory authority for promulgating the Rules and any amendments thereto is found at section 37-60-108, C.R.S. The Board's authority for the Colorado Instream Flow and Natural Lake Level Program is found at section 37-92-102(3), C.R.S.

HB 20-1157 revised section 37-83-105, C.R.S., pertaining to temporary loans of water to the Board for ISF use, and directed the Board to promulgate rules to implement certain provisions of the bill.

### IV. PARTY STATUS

The Notice of Rulemaking Hearing will be published in the Colorado Register on October 25, 2020. Applications for party status will be accepted through November 13, 2020. Applications for party status should be submitted to the Board's Hearing Officer, Amy Beatie, by email to [amy.beatie@coag.gov](mailto:amy.beatie@coag.gov). Applications for party status shall include: (1) the name of the person, persons or entity seeking party status; (2) a contact person, if different from IV.(1); (3) the appropriate mailing address, phone number, and email address for the contact person listed in IV.(2); (4) the interest of the person(s) or entity in the proposed amendments to the Rules; and (5) a description of the general nature of the evidence or information to be presented in the course of the proceedings. Staff is automatically a party to the rulemaking proceeding and need not file an application for party status.

## V. PRE-HEARING CONFERENCE

Prior to the rulemaking hearing, the Hearing Officer will hold a pre-hearing conference. After November 13, 2020, when all party status applications have been received, the Hearing Officer will issue an order notifying all parties of the date, time, and location or call-in information for the first pre-hearing conference. The order will also provide any other deadlines and procedures that are appropriate at the time. Participation in the pre-hearing conference may be available by telephone or video conference at the Hearing Officer's discretion; participation will likely only be available by remote participation.

Each applicant for party status must submit a pre-hearing statement in order to participate in the pre-hearing conference.

## VI. RULEMAKING HEARING

### Date, Time, and Location

DATE: January 26, 2021

TIME: 9:00 a.m. (or as otherwise directed by the Hearing Officer)

LOCATION: Via telephone or video conference. Participation information will be provided at a later date: (1) on the Board's website at <https://cwcb.colorado.gov/> and (2) by order of the Hearing Officer to the people or entities who have applied for party status.

### Procedures

The role of the Board's Hearing Officer is to provide orderly procedures for the rulemaking; ruling on substantive issues is a Board responsibility. The Hearing Officer will issue orders designed to streamline and clarify processes consistent with this Notice of Proposed Rulemaking and as permitted by law.

The Board may ask questions of any person appearing before it.

The Board will consider alternative proposals related to the proposed amendments, subject to the procedures established by the Hearing Officer.

The Board may modify the proposed amendments to the Rules from those published in the Colorado Register.

After the conclusion of the rulemaking hearing and after consideration of the relevant matters presented, the Board, through its Hearing Officer, will render its decision to the parties to the hearing.

### Hearing Participation

At the hearing, parties shall be afforded the opportunity to submit written data, views, or arguments, and to present the same orally, unless the Board deems it unnecessary. The submittal of such material and summations, either in writing or orally, shall be as directed by the Hearing

Officer or the Board.

If alternative amendments to the proposed amendments to the Rules are requested by a party, the Board encourages those amendments to be included in the written materials, along with a proposed statement of basis and purpose of the alternative amendments.

Once any written material is submitted, the material becomes part of the administrative rulemaking record and the property of the Board and will not be returned to the person(s) or entity submitting the material.

The Hearing Officer will decide the timing and order of oral presentations by the parties, if any. Any person who is not a party to the hearing but wishes to provide comment may do so in writing prior to the date of the hearing. The Board strongly encourages all interested persons to submit comments in writing; however, a short period of time at the rulemaking hearing (a total of 30 minutes or less) will be reserved for oral comments by interested persons who do not have party status.

#### VII. ADOPTION OF THE RULES

The Board will consider all information presented at the hearing.

The Board may modify the proposed amendments to the Rules in adopting amendments to the Rules.

The final amended Rules, as adopted by the Board, shall become effective no sooner than twenty (20) days after publication in the Colorado Register.

#### VIII. ADMINISTRATIVE RULEMAKING RECORD

The administrative rulemaking record, including the proposed rule amendments, submitted applications for party status, pre-hearing statements, and all other written materials to be considered by the Board in this rulemaking, will be available following the conclusion of these proceedings and upon request to [kimberly.ricotta@state.co.us](mailto:kimberly.ricotta@state.co.us), and at the Board's office at 1313 Sherman Street, Room 718, Denver, CO 80203, during normal business hours (8:00 a.m.-5:00 p.m.), once state agencies are again open to the public.

DATED this 14th day of October, 2020.



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Rebecca Mitchell  
Director  
Colorado Water Conservation Board  
1313 Sherman Street, Rm. 718  
Denver, CO 80203



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## Proposed Rule Submitted - CWCB ISF Rulemaking - Temp Water Loans -

1 message

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**DORA\_OPR\_Website@state.co.us** <DORA\_OPR\_Website@state.co.us>  
To: kaylea.white@state.co.us

Wed, Oct 14, 2020 at 9:07 AM

The following Proposed Rule has been submitted to the Colorado Office of Policy, Research and Regulatory Reform:

**Department:** Department of Natural Resources

**Rulemaking Agency:** Colorado Water Conservation Board

**Rule ID:** 8634

**Title or Subject:** RULES CONCERNING THE COLORADO INSTREAM FLOW AND NATURAL LAKE LEVEL PROGRAM

**Submitted by:** Kaylea M White

**Date Submitted:** 10/14/2020

After your submission has been checked for completeness, it will be made available to the general public on DORA's website and email notifications will be sent to interested stakeholders.

In accordance with SB13-158, the public will have until Friday, October 30th, 2020 at midnight to request that the Department of Regulatory Agencies require your agency to prepare a cost-benefit analysis of these rules or amendments. You will be copied on all stakeholder requests for a cost-benefit analysis and DORA staff will contact you to discuss the requests. A second email notification will be sent if you are required to submit a cost-benefit analysis as a result of a public request.

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Please contact us at [DORA\\_OPR\\_Website@state.co.us](mailto:DORA_OPR_Website@state.co.us) if you have further questions regarding this e-mail message.

## 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 prepare 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 provide 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~~ 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.**

...

**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.**

...

**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:



...

- (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 CPW~~DOW~~) 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.

...

- (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 CPW~~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.

...

- (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:

...

- iii. A provision allowing CWCB or CPW~~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);

#### **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.

## 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” or “CWCB”). The Rules Concerning the Colorado Instream Flow and Natural Lake Level Program, 2 CCR 408-2 (“Rules”), initially adopted in 1993, codify and establish procedures for the Board to implement the ISF Program.

In 2020, the Board amended the Rules to: (1) address the requirements of House Bill 20-1157 (codified at section 37-83-105, C.R.S.); (2) update a reference to the CWCB’s website; and (3) update references to Colorado Parks and Wildlife (“CPW”). The statutory authority for the Rules and the 2020 revisions to the Rules is found at sections 37-60-108, 37-83-105(3), and 37-92-102(3), C.R.S. (2020).

For the 2020 revisions, the Board revised Rule 4c. to update the CWCB website address, and amended Rules 6f.(2); 7d.; 8i.(3)(f), (h), and (l)(iii); and 11c. to update references to Colorado Parks and Wildlife (“CPW”). The Board also revised Rules 6k. and 6m. to address requirements of House Bill 20-1157 regarding temporary expedited and renewable loans of water to the Board for instream flow (“ISF”) use.

Specifically, Rule 6k. defines temporary (expedited and renewable) loans; describes allowable uses for each type of loan and time periods for which they may be exercised; and refers to the owner of a decreed water right who has offered water to the Board for an expedited or renewable loan as an “applicant.” The language of Rule 6k.(1) previously pertained to all temporary loans of water but now is split into Rule 6k.(1) and 6k.(2) to address expedited and temporary loans separately. Rule 6k.(1) now addresses expedited loans, describing: (a) limitations on the use of such loans; (b) the timing of the CWCB Director’s response to an offer of an expedited loan of water for temporary ISF use, and though applicant is ultimately responsible for submitting documentation and requesting approval, the actions staff will take in coordination with an applicant to request approval from the State Engineer of an expedited loan, including preparing and submitting documentation and providing written notice as required by the statute; and (c) the Board’s delegation of authority to the CWCB Director, provided that the State Engineer has determined that no injury will result from the expedited loan, to: (i) accept and execute an agreement for the expedited loan of water; and (ii) take any administrative action necessary to put the loaned water to instream flow use. Rule 6k.(1)(d) revisions confirm that the CWCB’s use of water under an expedited loan is subject to the CWCB’s decreed instream flow rate(s), time period(s) and reach(es) and any conditions imposed by the State Engineer to prevent injury. Rule 6k.(1)(e) describes the timing of the Board’s review and action on the CWCB Director’s decision regarding an offer of an expedited loan, and now clarifies that if applicant agrees the loan offer should be rejected, that decision does not have to be brought to the Board. Rule 6k.(1)(f) directs the Board, Director, and staff to expedite all actions necessary to implement expedited loans under Rule 6k.(1).

Rule 6k.(2) is a completely new provision that addresses renewable loans of water for temporary instream flow use. Rule 6k.(2)(a) identifies timing limitations on the exercise of renewable loans and provides that 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. Rules 6k.(2)(b) and (c) identify the Board process for reviewing, considering public comment, and directing Staff whether to move forward with a proposed renewable loan, and provide direction on how



a person can request a hearing on a proposed renewable loan. Rule 6k.(2)(d) sets forth actions the Board will take when considering a proposed renewable loan to improve the natural environment to a reasonable degree. Rule 6k.(2)(e) describes the types of water rights and water activities the Board must consider any potential injury to when evaluating a proposed renewable loan. Rules 6k.(2)(f) and (g) describe the actions the Board authorizes and directs Staff to take when the Board directs Staff to move forward with a proposed renewable loan, including coordinating with the applicant in preparing and submitting documentation and providing written notice as required by statute, though the applicant is ultimately responsible for these acts, and provided that the State Engineer determines no injury will result from the proposed loan, executing an agreement for the loan and taking any administrative action necessary to put the loaned water to instream flow use. Rule 6k.(2)(h) provides that the CWCB's instream flow use of loaned water shall not extend beyond the subject 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. Rule 6k.(2)(i) provides that in each year that a renewable loan is exercised, the applicant, coordinating with Staff if necessary, shall provide the written notice required by statute. Rule 6k.(2)(j) sets forth the Board's process for reviewing, considering public comment, and deciding whether to authorize Staff to coordinate with an applicant on applying for a renewal of an existing renewable loan for an additional ten-year period, including preparing and submitting documentation and providing written notice as required by statute.

Rule 6k.(3) is taken directly from HB20-1157 and provides that 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.

In 2020, the Board also amended Rule 6m. to exclude expedited and temporary loans from the process in Rules 11a-11c, and to address the hearing process for renewable loans, which differs from the hearing process for other acquisitions of water for instream flow use only regarding to whom and when notice of a hearing will be provided. Rule 6m.(5)(d) has been added and provides that at least thirty days prior to the hearing date, the Board shall provide written notice of a hearing on a proposed renewable loan, including the process and deadlines for participating in the hearing, to the applicant and to the recipients specified in section 37-83-105(2)(b)(II), C.R.S.

## 14. Rulemaking Hearing Officer Orders

## BEFORE THE COLORADO WATER CONSERVATION BOARD

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### IN THE MATTER OF THE RULEMAKING HEARING TO REVISE RULES CONCERNING THE COLORADO INSTREAM FLOW AND NATURAL LAKE LEVEL PROGRAM, 2 CCR 408-2

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#### ORDER RE: APPLICATIONS FOR PARTY STATUS

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On September 16, 2020, the Colorado Water Conservation Board ("CWCB") designated Deputy Attorney General Amy Beatie as Hearing Officer for the rulemaking for consideration of amendments to the CWCB's Rules Concerning the Colorado Instream Flow and Natural Lake Level Program, 2 CCR 408-2 ("Rules"). The CWCB is amending the Rules to: (1) address the requirements of House Bill 20-1157; (2) update a reference to the CWCB's website; and (3) update references to Colorado Parks and Wildlife.

The language of the proposed amendments to the Rules, and a proposed statement of basis and purpose and specific statutory authority for the amendments, are available on the CWCB's website at <https://cwcb.colorado.gov/instream-flow-rules-revisions-hb-20-1157>.

Pursuant to the Notice of Proposed Rulemaking issued by the CWCB dated October 14, 2020 (published in the Colorado Register on October 25, 2020) ("NoPR"), Applications for Party Status were due to the Hearing Officer by email by November 13, 2020.

The Hearing Officer received complete and timely Applications for Party Status from the following entities:

- a) The Nature Conservancy;
- b) Colorado Water Trust;
- c) City of Aurora;
- d) Mesa County, Colorado;
- e) Trout Unlimited;
- f) Western Resource Advocates, Conservation Colorado, and the National Audubon Society;
- g) Colorado River Water Conservation District; and
- h) Colorado Parks & Wildlife.

All Applications for Party Status are attached hereto as Exhibits A-H. All entities that submitted timely Applications for Party Status, as shown above, are hereby designated as Parties to the Rulemaking. Pursuant to the NoPR, CWCB staff was not required to submit an Application for Party Status; CWCB staff is hereby designated a Party to the rulemaking.

The Parties must maintain current contact information and shall promptly file notice of any changes to the Party's email address(es) for the purpose of service. For purposes of this Order, "file" means the document must be received electronically by the Hearing Officer and other Parties via the email addresses included in the attached Certificate of Service. All filings concerning this rulemaking must have "ISF RULEMAKING" in the subject line.

Dated this 17th day of November, 2020.

By the Hearing Officer:

/s/ Amy W. Beatie

Amy W. Beatie  
Deputy Attorney General  
Colorado Attorney General's Office  
1300 Broadway, 7th Floor  
Denver, CO 80203  
720-508-6295  
[amy.beatie@coag.gov](mailto:amy.beatie@coag.gov)

**Certificate of Service**

**IN THE MATTER OF THE RULEMAKING HEARING TO REVISE RULES CONCERNING THE  
COLORADO INSTREAM FLOW AND NATURAL LAKE LEVEL PROGRAM, 2 CCR 408-2**

I hereby certify that on November 17th, 2020, a true and correct copy of the foregoing **ORDER RE: APPLICATIONS FOR PARTY STATUS** was served via email to the Parties referenced in the Party Status below:

**Hearing Officer**

Amy Beatie  
Deputy Attorney General  
Natural Resources & Environment Section  
Office of the Colorado Attorney General  
1300 Broadway, 7th Floor  
Denver, Colorado 80203  
720-508-6295  
[amy.beatie@coag.gov](mailto:amy.beatie@coag.gov)

Copy To:  
[john.watson@coag.gov](mailto:john.watson@coag.gov)

**Party Status**

Staff of the Colorado Water Conservation Board

Linda Bassi  
Colorado Water Conservation Board  
1313 Sherman Street, Room 718  
Denver, CO 80203  
303-866-3441 ext. 3204  
[linda.bassi@state.co.us](mailto:linda.bassi@state.co.us)

Counsel for Staff of the Colorado Water Conservation Board

Jen Mele  
Marc Sarmiento  
Allison Robinette  
Natural Resources & Environment  
Section  
Office of the Colorado Attorney General  
1300 Broadway, 7th Floor  
Denver, CO 80203  
720-508-6259  
[jennifer.mele@coag.gov](mailto:jennifer.mele@coag.gov)  
[marc.sarmiento@coag.gov](mailto:marc.sarmiento@coag.gov)  
[allison.robinette@coag.gov](mailto:allison.robinette@coag.gov)

<u>The Nature Conservancy</u>  Aaron Citron 2424 Spruce Street Boulder, CO 80302 520-730-3421 <a href="mailto:aaron.citron@tnc.org">aaron.citron@tnc.org</a>	<u>Colorado Water Trust</u>  Kate Ryan 3264 Larimer Street, Suite D Denver, CO 80205 720-570-2897 <a href="mailto:kryan@coloradowatertrust.org">kryan@coloradowatertrust.org</a>
<u>City of Aurora</u>  Counsel: John M. Dingess 3600 S. Yosemite Street, Suite 500 Denver, Colorado 80237-1829 303-779-0200 <a href="mailto:mail@hrodllaw.com">mail@hrodllaw.com</a> <a href="mailto:jdingess@hrodllaw.com">jdingess@hrodllaw.com</a>  Staff Contact: Erich Fowler 15151 E. Alameda Parkway, Suite 3600 Aurora, Colorado 80012-1555 303-739-7467 <a href="mailto:esfowler@auroragov.org">esfowler@auroragov.org</a>	<u>Mesa County, Colorado</u>  Amber Swasey Mesa County Community Development PO Box 20,000-5022 Grand Junction, CO 81502 970-244-1762 <a href="mailto:amber.swasey@mesacounty.us">amber.swasey@mesacounty.us</a>
<u>Trout Unlimited</u>  Drew Peternell Trout Unlimited P.O. Box 4165 Eagle, Colorado 81631 303-204-3057 <a href="mailto:drew.peternell@tu.org">drew.peternell@tu.org</a>	<u>Western Resource Advocates, Conservation Colorado, and the National Audubon Society</u>  John Cyran 2260 Baseline Road Boulder, CO 80302 303-746-3802 <a href="mailto:john.cyran@westernresources.org">john.cyran@westernresources.org</a>

<u>Colorado River Water Conservation District</u>  Peter C. Fleming Jason V. Turner Lorra Nichols Colorado River Water Conservation District P.O. Box 1120 Glenwood Springs, Colorado 81602 970-945-8522 <a href="mailto:pfleming@crwcd.org">pfleming@crwcd.org</a> <a href="mailto:jturner@crwcd.org">jturner@crwcd.org</a> <a href="mailto:lnichols@crwcd.org">lnichols@crwcd.org</a>	<u>Colorado Parks and Wildlife</u>  Katie Birch Rob Harris 6060 Broadway Denver, CO 80216 303-291-7335 303-291-7550 <a href="mailto:katie.birch@state.co.us">katie.birch@state.co.us</a> <a href="mailto:robert.harris@state.co.us">robert.harris@state.co.us</a>  Elizabeth Joyce 1300 Broadway Denver, CO 80203 720-508-6761 <a href="mailto:elizabeth.joyce@coag.gov">elizabeth.joyce@coag.gov</a>
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/s/ John Watson  
John Watson

## BEFORE THE COLORADO WATER CONSERVATION BOARD

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### IN THE MATTER OF THE RULEMAKING HEARING TO REVISE RULES CONCERNING THE COLORADO INSTREAM FLOW AND NATURAL LAKE LEVEL PROGRAM, 2 CCR 408-2

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#### ORDER RE: PROCEDURES AND DEADLINES FOR PREHEARING SUBMISSIONS

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Pursuant to the Notice of Proposed Rulemaking issued by the CWCB dated October 14, 2020 (published in the Colorado Register on October 25, 2020) (“NoPR”), the Hearing Officer hereby establishes the following deadlines and procedures for written submissions and designation of witnesses and sets the date of the prehearing conference.

For purposes of this and all future orders in this matter, “file” means the document must be received electronically by the Hearing Officer and other Parties by the date and time specified herein via the email addresses included in the attached Certificate of Service.

#### I. Prehearing Processes and Deadlines

##### ***Thursday, December 10, 2020 at 5:00 p.m.: Prehearing Statements from Parties Due***

On or before 5:00 p.m. on December 10, 2020, each Party shall file a prehearing statement. Each Party must submit a prehearing statement in order to participate in the prehearing conference. 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 statement of the Party’s position(s). If submitting any amendments to the proposed Rules published with the NoPR, those amendments should be provided as an exhibit, along with a proposed statement of basis and purpose of the alternative amendments.
- b) A witness list with a brief description of each witness’s testimony and a resume for each witness who will present testimony on technical issues.
- c) A statement of any open legal questions.
- d) A statement of the relief requested.
- e) The amount of time desired for the Party’s presentation at the hearing.
- f) An exhibit list and exhibits. Exhibits must be named by “Party Name” as defined below and numbered in the order presented in



the exhibit list. E.g., “CWCBStaff-1.” Each exhibit must be labeled separately and filed electronically as a separate file at the time of submission of the prehearing statement. All exhibits filed in this proceeding must be filed according to this process. The Party Names are defined as follows:

- i. CWCB Staff: CWCBStaff
- ii. The Nature Conservancy: TNC
- iii. Colorado Water Trust: CWT
- iv. City of Aurora: Aurora
- v. Mesa County, Colorado: MesaCty
- vi. Trout Unlimited: TU
- vii. Western Resource Advocates, Conservation Colorado, and the National Audubon Society: WRAetal
- viii. Colorado River Water Conservation District: CRWCD
- ix. Colorado Parks & Wildlife: CPW

All arguments a Party wishes to make regarding the rulemaking must be included in the prehearing statement. Prehearing statements are limited to ten (10) double-spaced pages in 12-point font, excluding the certificate of service and any exhibits.

Each Party may list no more than three (3) witnesses. All witnesses included in the Party’s witness list must prepare pre-filed written testimony (see below).

Exhibits must be submitted as described above—i.e., appropriately labeled and separately submitted—at the time of filing or they may be excluded at the Hearing Officer’s discretion. Please note that it is the Party’s responsibility to find an appropriate manner to submit filings so that they are received by the deadline.

***Thursday, December 17, 2020 at 9:00 a.m.: Prehearing Conference***

A prehearing conference will be held on Thursday, December 17, 2020, at 9:00 a.m. via Zoom. A Zoom link will be provided in advance of the prehearing conference.

The prehearing conference will afford the Parties the opportunity to address such issues as desired time for each Party to present at the hearing, how to avoid presentation of duplicative information, and consolidation of concerns. The Parties may formulate stipulations respecting the issues to be raised, witnesses and exhibits to be presented, and any other matters which may be agreed to or admitted by the Parties. Coordination of written submissions and presentations is encouraged.

At the prehearing conference, each Party shall identify any objections it anticipates raising at the hearing (unless such objections could not have been reasonably determined by the time of the prehearing conference).

***Tuesday, January 5, 2021 at 5:00 p.m.: Rebuttal Statements Due***

On or before January 5, 2021 at 5:00 p.m., each Party shall file its rebuttal

statement. All rebuttal statements are limited to eight (8) double-spaced pages in 12-point font, excluding the certificate of service and any attached exhibits. Any exhibits shall be submitted in accordance with the same requirements as the prehearing statement outlined above. Replies in support of a prehearing statement are not authorized.

### ***Tuesday, January 12, 2021 at 5:00 p.m.: Pre-filed Written Testimony***

In addition to filing a prehearing statement and a rebuttal statement, on or before January 12, 2021 at 5:00 p.m., a Party must file pre-filed written testimony for any witness listed in its prehearing statements. Pre-filed written testimony encourages Parties to fully develop and disclose their arguments prior to the hearing. This allows the CWCB to better prepare for the hearing by reviewing the Parties' positions in advance. Pre-filed written testimony is limited to eight (8) double-spaced pages in 12-point font, excluding the certificate of service. No new exhibits may be filed with the pre-filed written testimony without approval by the Hearing Officer.

All witnesses who prepared pre-filed written testimony must be available at the time of the hearing to answer any questions the CWCB might have about such pre-filed written testimony.

## **II. Party Status**

Party status may be lost due to a Party's failure to appear for the initial prehearing conference or any additional prehearing conferences, or for failure to file a prehearing statement. A Party that loses party status will be able to address the CWCB during the public comment period.

## **III. Tuesday, January 26, 2021 at 9:00 a.m.: Hearing**

The NoPR set the hearing in this matter in conjunction with the CWCB's January 2021 meeting, specifically for 9:00 a.m. on January 26, 2021, with the location listed as via telephone or video conference. More specific participation information will be provided: (1) on the CWCB's website at <https://cwcb.colorado.gov/>; and (2) by order of the Hearing Officer sent to the Parties prior to the hearing.

In addition to other matters related to the conduct of the hearing, the Hearing Officer will determine the final time allocations for each Party to present its case after consideration of, among other things, the prehearing statements, the number of witnesses, and the pre-filed written testimony. The Hearing Officer may limit testimony or presentation of evidence to prevent repetitive, irrelevant, or unnecessary testimony.

The Hearing Officer will issue such additional orders as are necessary to provide for any additional prehearing processes and to establish the hearing process.

The following is a summary of the schedule as set forth in this order:

Deadline for Parties' Submission of Prehearing Statements	December 10, 2020, 5:00 p.m.
Prehearing Conference	December 17, 2020, 9:00 a.m.
Deadline for Parties' Submission of Rebuttal Statements	January 5, 2021, 5:00 p.m.
Deadline for Parties' Submission of Pre-filed Written Testimony	January 12, 2021, 5:00 p.m.
Rulemaking Hearing	January 26, 2021, 9:00 a.m.

*IT IS SO ORDERED.*

Dated this 20th day of November, 2020.

By the Hearing Officer:

/s/ Amy W. Beatie

Amy W. Beatie  
Deputy Attorney General  
Colorado Attorney General's Office  
1300 Broadway, 7th Floor  
Denver, CO 80203  
720-508-6295  
[amy.beatie@coag.gov](mailto:amy.beatie@coag.gov)

**Certificate of Service**

**IN THE MATTER OF THE RULEMAKING HEARING TO REVISE RULES CONCERNING THE  
COLORADO INSTREAM FLOW AND NATURAL LAKE LEVEL PROGRAM, 2 CCR 408-2**

I hereby certify that on November 20th, 2020, a true and correct copy of the foregoing **ORDER RE: PROCEDURES AND DEADLINES FOR PREHEARING SUBMISSIONS** was served via email to the Parties referenced in the Party Status below:

**Hearing Officer**

Amy Beatie  
Deputy Attorney General  
Natural Resources & Environment Section  
Office of the Colorado Attorney General  
1300 Broadway, 7th Floor  
Denver, Colorado 80203  
720-508-6295  
[amy.beatie@coag.gov](mailto:amy.beatie@coag.gov)

Copy To:  
[john.watson@coag.gov](mailto:john.watson@coag.gov)

**Parties**

**Staff of the Colorado Water Conservation Board**

Linda Bassi  
Colorado Water Conservation Board  
1313 Sherman Street, Room 718  
Denver, CO 80203  
303-866-3441 ext. 3204  
[linda.bassi@state.co.us](mailto:linda.bassi@state.co.us)

**Counsel for Staff of the Colorado Water Conservation Board**

Jen Mele  
Marc Sarmiento  
Allison Robinette  
Natural Resources & Environment  
Section  
Office of the Colorado Attorney General  
1300 Broadway, 7th Floor  
Denver, CO 80203  
720-508-6259  
[jennifer.mele@coag.gov](mailto:jennifer.mele@coag.gov)  
[marc.sarmiento@coag.gov](mailto:marc.sarmiento@coag.gov)  
[allison.robinette@coag.gov](mailto:allison.robinette@coag.gov)

<u>The Nature Conservancy</u>  Aaron Citron 2424 Spruce Street Boulder, CO 80302 520-730-3421 <a href="mailto:aaron.citron@tnc.org">aaron.citron@tnc.org</a>	<u>Colorado Water Trust</u>  Kate Ryan 3264 Larimer Street, Suite D Denver, CO 80205 720-570-2897 <a href="mailto:kryan@coloradowatertrust.org">kryan@coloradowatertrust.org</a>
<u>City of Aurora</u>  <u>Counsel:</u> John M. Dingess 3600 S. Yosemite Street, Suite 500 Denver, Colorado 80237-1829 303-779-0200 <a href="mailto:mail@hrodllaw.com">mail@hrodllaw.com</a> <a href="mailto:jdingess@hrodllaw.com">jdingess@hrodllaw.com</a>  <u>Staff Contact:</u> Erich Fowler 15151 E. Alameda Parkway, Suite 3600 Aurora, Colorado 80012-1555 303-739-7467 <a href="mailto:esfowler@auroragov.org">esfowler@auroragov.org</a>	<u>Mesa County, Colorado</u>  Amber Swasey Mesa County Community Development PO Box 20,000-5022 Grand Junction, CO 81502 970-244-1762 <a href="mailto:amber.swasey@mesacounty.us">amber.swasey@mesacounty.us</a>
<u>Trout Unlimited</u>  Drew Peternell Trout Unlimited P.O. Box 4165 Eagle, Colorado 81631 303-204-3057 <a href="mailto:drew.peternell@tu.org">drew.peternell@tu.org</a>	<u>Western Resource Advocates, Conservation Colorado, and the National Audubon Society</u>  John Cyran 2260 Baseline Road Boulder, CO 80302 303-746-3802 <a href="mailto:john.cyran@westernresources.org">john.cyran@westernresources.org</a>

<u>Colorado River Water Conservation District</u>  Peter C. Fleming Jason V. Turner Lorra Nichols Colorado River Water Conservation District P.O. Box 1120 Glenwood Springs, Colorado 81602 970-945-8522 <a href="mailto:pfleming@crwcd.org">pfleming@crwcd.org</a> <a href="mailto:jturner@crwcd.org">jturner@crwcd.org</a> <a href="mailto:lnichols@crwcd.org">lnichols@crwcd.org</a>	<u>Colorado Parks and Wildlife</u>  <u>Staff Contacts:</u> Katie Birch Rob Harris 6060 Broadway Denver, CO 80216 303-291-7335 303-291-7550 <a href="mailto:katie.birch@state.co.us">katie.birch@state.co.us</a> <a href="mailto:robert.harris@state.co.us">robert.harris@state.co.us</a>  <u>Counsel:</u> Elizabeth Joyce 1300 Broadway Denver, CO 80203 720-508-6761 <a href="mailto:elizabeth.joyce@coag.gov">elizabeth.joyce@coag.gov</a>
--	---

/s/ John Watson  
John Watson

## **BEFORE THE COLORADO WATER CONSERVATION BOARD**

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### **IN THE MATTER OF THE RULEMAKING HEARING TO REVISE RULES CONCERNING THE COLORADO INSTREAM FLOW AND NATURAL LAKE LEVEL PROGRAM, 2 CCR 408-2**

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### **AMENDED ORDER RE: PREHEARING STATEMENTS, MESA COUNTY'S PARTY STATUS, AND FILING REQUIREMENTS**

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Prehearing statements in this matter were received from the following Parties on December 10, 2020:

- a) Staff of the Colorado Water Conservation Board;
- b) The Nature Conservancy;
- c) Colorado Water Trust;
- d) City of Aurora;
- e) Trout Unlimited;
- f) Western Resource Advocates, Conservation Colorado, and the National Audubon Society;
- g) The Colorado River Water Conservation District; and
- h) Colorado Parks & Wildlife.

Mesa County elected not to submit a prehearing statement and, as a result, will no longer be participating as a Party to this rulemaking.

Some Parties failed to transmit their prehearing statements to all email addresses on the service list attached to the Hearing Officer's November 20, 2020 Order re: Procedures and Deadlines for Prehearing Submissions (the "November 20 Order") and others sent them to email addresses containing typographical errors. Please ensure that all Parties have received all prehearing statements filed in this matter.

The Colorado River Water Conservation District's prehearing statement failed to include all information required by the November 20 Order. The Colorado River Water Conservation District may file an amended prehearing statement to provide the following information required pursuant to the November 20 Order:

- a) A statement of any open legal questions.
- b) A statement of the relief requested.
- c) The amount of time desired for the Party's presentation at the hearing.

This amended prehearing statement must be received by all Parties no later than 5:00 pm on Monday, December 14, 2020. Failure to file the amended prehearing statement

by this deadline will result in the loss of the Colorado River Water Conservation District's Party status.

The Parties are reminded that, pursuant to the November 17, 2020 Order re: Applications for Party Status, all filings concerning this rulemaking must have "ISF RULEMAKING" in the subject line of the email.

*IT IS SO ORDERED.*

Dated this 11th day of December, 2020.

By the Hearing Officer:

/s/ Amy W. Beatie

Amy W. Beatie  
Deputy Attorney General  
Colorado Attorney General's Office  
1300 Broadway, 7th Floor  
Denver, CO 80203  
720-508-6295  
[amy.beatie@coag.gov](mailto:amy.beatie@coag.gov)



**Certificate of Service**

**IN THE MATTER OF THE RULEMAKING HEARING TO REVISE RULES CONCERNING THE  
COLORADO INSTREAM FLOW AND NATURAL LAKE LEVEL PROGRAM, 2 CCR 408-2**

I hereby certify that on December 11th, 2020, a true and correct copy of the foregoing **ORDER RE: PREHEARING STATEMENTS, MESA COUNTY'S PARTY STATUS, AND FILING REQUIREMENTS** was served via email to the Hearing Officer and the Parties referenced below:

**Hearing Officer**

Amy Beatie  
Deputy Attorney General  
Natural Resources & Environment Section  
Office of the Colorado Attorney General  
1300 Broadway, 7th Floor  
Denver, Colorado 80203  
720-508-6295  
[amy.beatie@coag.gov](mailto:amy.beatie@coag.gov)

Copy To:  
[john.watson@coag.gov](mailto:john.watson@coag.gov)

**Parties**

**Staff of the Colorado Water Conservation Board**

Linda Bassi  
Colorado Water Conservation Board  
1313 Sherman Street, Room 718  
Denver, CO 80203  
303-866-3441 ext. 3204  
[linda.bassi@state.co.us](mailto:linda.bassi@state.co.us)

**Counsel for Staff of the Colorado Water Conservation Board**

Jen Mele  
Marc Sarmiento  
Allison Robinette  
Natural Resources & Environment  
Section  
Office of the Colorado Attorney General  
1300 Broadway, 7th Floor  
Denver, CO 80203  
720-508-6259  
[jennifer.mele@coag.gov](mailto:jennifer.mele@coag.gov)  
[marc.sarmiento@coag.gov](mailto:marc.sarmiento@coag.gov)  
[allison.robinette@coag.gov](mailto:allison.robinette@coag.gov)

<u>The Nature Conservancy</u>  Aaron Citron 2424 Spruce Street Boulder, CO 80302 520-730-3421 <a href="mailto:aaron.citron@tnc.org">aaron.citron@tnc.org</a>	<u>Colorado Water Trust</u>  Kate Ryan 3264 Larimer Street, Suite D Denver, CO 80205 720-570-2897 <a href="mailto:kryan@coloradowatertrust.org">kryan@coloradowatertrust.org</a>
<u>City of Aurora</u>  <u>Counsel:</u> John M. Dingess 3600 S. Yosemite Street, Suite 500 Denver, Colorado 80237-1829 303-779-0200 <a href="mailto:mail@hrodllaw.com">mail@hrodllaw.com</a> <a href="mailto:jdingess@hrodllaw.com">jdingess@hrodllaw.com</a>  <u>Staff Contact:</u> Erich Fowler 15151 E. Alameda Parkway, Suite 3600 Aurora, Colorado 80012-1555 303-739-7467 <a href="mailto:esfowler@auroragov.org">esfowler@auroragov.org</a>	<u>Mesa County, Colorado</u>  Amber Swasey Mesa County Community Development PO Box 20,000-5022 Grand Junction, CO 81502 970-244-1762 <a href="mailto:amber.swasey@mesacounty.us">amber.swasey@mesacounty.us</a>
<u>Trout Unlimited</u>  Drew Peternell Trout Unlimited P.O. Box 4165 Eagle, Colorado 81631 303-204-3057 <a href="mailto:drew.peternell@tu.org">drew.peternell@tu.org</a>	<u>Western Resource Advocates, Conservation Colorado, and the National Audubon Society</u>  John Cyran 2260 Baseline Road Boulder, CO 80302 303-746-3802 <a href="mailto:john.cyran@westernresources.org">john.cyran@westernresources.org</a>

<u>Colorado River Water Conservation District</u>  Peter C. Fleming Jason V. Turner Lorra Nichols Colorado River Water Conservation District P.O. Box 1120 Glenwood Springs, Colorado 81602 970-945-8522 <a href="mailto:pfleming@crwcd.org">pfleming@crwcd.org</a> <a href="mailto:jturner@crwcd.org">jturner@crwcd.org</a> <a href="mailto:lnichols@crwcd.org">lnichols@crwcd.org</a>	<u>Colorado Parks and Wildlife</u>  <u>Staff Contacts:</u> Katie Birch Rob Harris 6060 Broadway Denver, CO 80216 303-291-7335 303-291-7550 <a href="mailto:katie.birch@state.co.us">katie.birch@state.co.us</a> <a href="mailto:robert.harris@state.co.us">robert.harris@state.co.us</a>  <u>Counsel:</u> Elizabeth Joyce 1300 Broadway Denver, CO 80203 720-508-6761 <a href="mailto:elizabeth.joyce@coag.gov">elizabeth.joyce@coag.gov</a>
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/s/ John Watson  
John Watson

## BEFORE THE COLORADO WATER CONSERVATION BOARD

---

### IN THE MATTER OF THE RULEMAKING HEARING TO REVISE RULES CONCERNING THE COLORADO INSTREAM FLOW AND NATURAL LAKE LEVEL PROGRAM, 2 CCR 408-2

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#### ORDER RE: WITHDRAWAL OF CITY OF AURORA'S PARTY STATUS, REQUEST FOR REVISED DESIRED TESTIMONY TIMES, AND DEADLINE FOR SUBMISSION OF DEMONSTRATIVE EXHIBITS

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##### **I. Withdrawal of City of Aurora's Party Status**

On December 21, 2020, the City of Aurora filed a Withdrawal of Party Status and is no longer a Party to this rulemaking.

##### **II. Request for Revised Desired Testimony Times**

In light of the fact that the remaining Parties have all stated support for the draft rules in their Prehearing Statements, the Hearing Officer requests that all remaining Parties submit a revised request for the amount of time desired for the Party's presentations and closing statements, if needed, at the upcoming hearing. This request must be submitted by January 6, 2021 at 5:00 p.m. by email to John Watson at [John.Watson@coag.gov](mailto:John.Watson@coag.gov). The Parties need not copy each other on these emails as long as the email's contents pertain solely to the amount of time requested. An order regarding what to expect the day of the hearing and each Party's allotted time will be issued following the submission of these requests for time.

##### **III. Deadline for Submission of Demonstrative Exhibits**

At the Prehearing Conference, the Parties and Hearing Officer discussed disclosure, prior to the hearing in this matter, of demonstrative exhibits. All agreed that prior disclosure was desirable. Thus, if a Party intends to use a demonstrative exhibit such as a PowerPoint, it must be filed by January 21, 2021 at 5:00 p.m.

The following is a summary of the remaining schedule as set forth in this order and prior orders:

Deadline for Parties' Submission of Rebuttal Statements	January 5, 2021, 5:00 p.m.
Deadline for Parties' Submittal of Revised Desired Testimony Times	January 6, 2021, 5:00 p.m.

Deadline for Parties' Submission of Pre-filed Written Testimony	January 12, 2021, 5:00 p.m.
Deadline for Submission of Demonstrative Exhibits	January 21, 2021, 5:00 p.m.
Rulemaking Hearing	January 26, 2021, 9:00 a.m.

*IT IS SO ORDERED.*

Dated this 4th day of January, 2021.

By the Hearing Officer:

/s/ Amy W. Beatie

Amy W. Beatie  
Deputy Attorney General  
Colorado Attorney General's Office  
1300 Broadway, 7th Floor  
Denver, CO 80203  
720-508-6295  
[amy.beatie@coag.gov](mailto:amy.beatie@coag.gov)

**Certificate of Service**

**IN THE MATTER OF THE RULEMAKING HEARING TO REVISE RULES CONCERNING THE  
COLORADO INSTREAM FLOW AND NATURAL LAKE LEVEL PROGRAM, 2 CCR 408-2**

I hereby certify that on January 4th, 2021, a true and correct copy of the foregoing **ORDER RE: WITHDRAWAL OF CITY OF AURORA'S PARTY STATUS, REQUEST FOR REVISED DESIRED TESTIMONY TIMES, AND DEADLINE FOR SUBMISSION OF DEMONSTRATIVE EXHIBITS** was served via email to the Hearing Officer and the Parties referenced below:

**Hearing Officer**

Amy Beatie  
Deputy Attorney General  
Natural Resources & Environment Section  
Office of the Colorado Attorney General  
1300 Broadway, 7th Floor  
Denver, Colorado 80203  
720-508-6295  
[amy.beatie@coag.gov](mailto:amy.beatie@coag.gov)

Copy To:  
[john.watson@coag.gov](mailto:john.watson@coag.gov)

**Parties**

**Staff of the Colorado Water Conservation Board**

Linda Bassi  
Colorado Water Conservation Board  
1313 Sherman Street, Room 718  
Denver, CO 80203  
303-866-3441 ext. 3204  
[linda.bassi@state.co.us](mailto:linda.bassi@state.co.us)

**Counsel for Staff of the Colorado Water Conservation Board**

Jen Mele  
Marc Sarmiento  
Allison Robinette  
Natural Resources & Environment  
Section  
Office of the Colorado Attorney General  
1300 Broadway, 7th Floor  
Denver, CO 80203  
720-508-6259  
[jennifer.mele@coag.gov](mailto:jennifer.mele@coag.gov)  
[marc.sarmiento@coag.gov](mailto:marc.sarmiento@coag.gov)  
[allison.robinette@coag.gov](mailto:allison.robinette@coag.gov)

<u>The Nature Conservancy</u>  Aaron Citron 2424 Spruce Street Boulder, CO 80302 520-730-3421 <a href="mailto:aaron.citron@tnc.org">aaron.citron@tnc.org</a>	<u>Colorado Water Trust</u>  Kate Ryan 3264 Larimer Street, Suite D Denver, CO 80205 720-570-2897 <a href="mailto:kryan@coloradowatertrust.org">kryan@coloradowatertrust.org</a>
<u>City of Aurora</u>  <u>Counsel:</u> John M. Dingess 3600 S. Yosemite Street, Suite 500 Denver, Colorado 80237-1829 303-779-0200 <a href="mailto:mail@hrodllaw.com">mail@hrodllaw.com</a> <a href="mailto:jdingess@hrodllaw.com">jdingess@hrodllaw.com</a>  <u>Staff Contact:</u> Erich Fowler 15151 E. Alameda Parkway, Suite 3600 Aurora, Colorado 80012-1555 303-739-7467 <a href="mailto:esfowler@auroragov.org">esfowler@auroragov.org</a>	<u>Trout Unlimited</u>  Drew Peternell Trout Unlimited P.O. Box 4165 Eagle, Colorado 81631 303-204-3057 <a href="mailto:drew.peternell@tu.org">drew.peternell@tu.org</a>
<u>Western Resource Advocates, Conservation Colorado, and the National Audubon Society</u>  John Cyran 2260 Baseline Road Boulder, CO 80302 303-746-3802 <a href="mailto:john.cyran@westernresources.org">john.cyran@westernresources.org</a>	<u>Colorado River Water Conservation District</u>  Peter C. Fleming Jason V. Turner Lorra Nichols Colorado River Water Conservation District P.O. Box 1120 Glenwood Springs, Colorado 81602 970-945-8522 <a href="mailto:pfleming@crwcd.org">pfleming@crwcd.org</a> <a href="mailto:jturner@crwcd.org">jturner@crwcd.org</a> <a href="mailto:lnichols@crwcd.org">lnichols@crwcd.org</a>

<p><u>Colorado Parks and Wildlife</u></p> <p><u>Staff Contacts:</u>  Katie Birch  Rob Harris  6060 Broadway  Denver, CO 80216  303-291-7335  303-291-7550  <u>katie.birch@state.co.us</u>  <u>robert.harris@state.co.us</u></p> <p><u>Counsel:</u>  Elizabeth Joyce  1300 Broadway  Denver, CO 80203  720-508-6761  <u>elizabeth.joyce@coag.gov</u></p>	
---	--

/s/ John Watson  
John Watson



## **BEFORE THE COLORADO WATER CONSERVATION BOARD**

---

### **IN THE MATTER OF THE RULEMAKING HEARING TO REVISE RULES CONCERNING THE COLORADO INSTREAM FLOW AND NATURAL LAKE LEVEL PROGRAM, 2 CCR 408-2**

---

#### **ORDER REGARDING HEARING PROCEDURES, TESTIMONY, AND TIME ALLOCATIONS**

---

The Parties provided desired time allocations for making presentations to the Colorado Water Conservation Board (“CWCB” or “Board”) in this matter in their Prehearing Statements. The Hearing Officer then held a Prehearing Conference on December 17, 2020 and issued the Order re: Withdrawal of City of Aurora’s Party Status, Request for Revised Desired Testimony Times, and Deadline for Submission of Demonstrative Exhibits on January 4, 2021, in both cases requesting, in part, that the Parties provide revised desired time allocations for making their presentations to the Board. Based on the information received and other considerations, the Hearing Officer issues this Order Regarding Hearing Procedures, Testimony, and Time Allocations:

#### **1. Hearing Time and Location.**

The Board will conduct this Rulemaking in conjunction with the CWCB's January 2021 meeting, beginning at 9:00 a.m. on January 26, 2021, via video conference. Although it was previously stated that more specific participation information would be provided on the CWCB’s website and by order of the Hearing Officer, participation information will instead be sent directly to the Parties via email.

#### **2. Rulemaking Hearing Order and Topics.**

- a. Roll call of Board members
- b. Public comment period (if any; limited to 3 minutes per person)
- c. Consideration of procedural matters (if any)
- d. CWCB Staff’s presentation of the Proposed Rules
- e. Party presentations
- f. Party closing statements
- g. CWCB Staff’s closing statement
- f. Board member deliberations
- g. Closing the record
- h. Decision on Final Proposed Rules

### **3. Party Time Allocation and Order of Presentations.**

Each Party may provide its presentation and closing statement as set out below. Time taken in responding to Board questions shall *not* be taken from the responding Party's allotted time and Board questions shall generally occur after each Party completes its presentation or closing statement.

Party	Presentation Time	Closing Statement Time
CWCB Staff	60 minutes	15 minutes
Colorado Parks and Wildlife	5 minutes	2 minutes
Colorado River Water Conservation District	5 minutes	None
Colorado Water Trust	10 minutes	5 minutes
The Nature Conservancy	5 minutes	None
Trout Unlimited	5 minutes	None
Western Resource Advocates, Conservation Colorado, and the National Audubon Society	5 minutes	None

### **4. PowerPoint Presentations and other Demonstrative Exhibits.**

Any Party may utilize PowerPoint slides or other demonstrative exhibits as part of its presentation. If a Party plans to use PowerPoint slides or other demonstrative exhibits, as previously established in the Order re: Withdrawal of City of Aurora's Party Status, Request for Revised Desired Testimony Times, and Deadline for Submission of Demonstrative Exhibits, that Party must file said exhibits in this proceeding by January 21, 2021 at 5:00 p.m. The Hearing Officer hereby requests CWCB Staff to provide these exhibits to the CWCB's hearing support/technical team so that they are loaded in advance of the hearing.

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This Order supersedes the Notice of Public Rulemaking ("NoPR") and other procedures previously discussed or established in this matter to the extent any provisions herein are inconsistent with the NoPR or other procedures previously discussed or established.

The Board may take actions, including without limitation, modifying or amending the rules proposed herein, or making modifications to other rules which it determines are reasonably necessary.

Any concerns with this order must be submitted in accordance with the same procedures as an official filing in this matter.

*IT IS SO ORDERED.*

Dated this 11th day of January, 2021.

By the Hearing Officer:

/s/ Amy W. Beatie

Amy W. Beatie  
Deputy Attorney General  
Colorado Attorney General's Office  
1300 Broadway, 7th Floor  
Denver, CO 80203  
720-508-6295  
[amy.beatie@coag.gov](mailto:amy.beatie@coag.gov)

**Certificate of Service**

**IN THE MATTER OF THE RULEMAKING HEARING TO REVISE RULES CONCERNING THE  
COLORADO INSTREAM FLOW AND NATURAL LAKE LEVEL PROGRAM, 2 CCR 408-2**

I hereby certify that on January 11th, 2021, a true and correct copy of the foregoing **ORDER REGARDING HEARING PROCEDURES, TESTIMONY, AND TIME ALLOCATIONS** was served via email on behalf of the Hearing Officer to the Parties referenced below:

**Hearing Officer**

Amy Beatie  
Deputy Attorney General  
Natural Resources & Environment Section  
Office of the Colorado Attorney General  
1300 Broadway, 7th Floor  
Denver, Colorado 80203  
720-508-6295  
[amy.beatie@coag.gov](mailto:amy.beatie@coag.gov)

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**Parties**

**Staff of the Colorado Water Conservation Board**

Linda Bassi  
Colorado Water Conservation Board  
1313 Sherman Street, Room 718  
Denver, CO 80203  
303-866-3441 ext. 3204  
[linda.bassi@state.co.us](mailto:linda.bassi@state.co.us)

**Counsel for Staff of the Colorado Water Conservation Board**

Jen Mele  
Marc Sarmiento  
Allison Robinette  
Natural Resources & Environment  
Section  
Office of the Colorado Attorney General  
1300 Broadway, 7th Floor  
Denver, CO 80203  
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[allison.robinette@coag.gov](mailto:allison.robinette@coag.gov)

<u>The Nature Conservancy</u>  Aaron Citron 2424 Spruce Street Boulder, CO 80302 520-730-3421 <a href="mailto:aaron.citron@tnc.org">aaron.citron@tnc.org</a>	<u>Colorado Water Trust</u>  Kate Ryan 3264 Larimer Street, Suite D Denver, CO 80205 720-570-2897 <a href="mailto:kryan@coloradowatertrust.org">kryan@coloradowatertrust.org</a>
<u>Trout Unlimited</u>  Drew Peternell Trout Unlimited P.O. Box 4165 Eagle, Colorado 81631 303-204-3057 <a href="mailto:drew.peternell@tu.org">drew.peternell@tu.org</a>	<u>Western Resource Advocates, Conservation Colorado, and the National Audubon Society</u>  John Cyran 2260 Baseline Road Boulder, CO 80302 303-746-3802 <a href="mailto:john.cyran@westernresources.org">john.cyran@westernresources.org</a>
<u>Colorado River Water Conservation District</u>  Peter C. Fleming Jason V. Turner Lorra Nichols Colorado River Water Conservation District P.O. Box 1120 Glenwood Springs, Colorado 81602 970-945-8522 <a href="mailto:pffleming@crwcd.org">pffleming@crwcd.org</a> <a href="mailto:jturner@crwcd.org">jturner@crwcd.org</a> <a href="mailto:lnichols@crwcd.org">lnichols@crwcd.org</a>	<u>Colorado Parks and Wildlife</u>  <u>Staff Contacts:</u> Katie Birch Rob Harris 6060 Broadway Denver, CO 80216 303-291-7335 303-291-7550 <a href="mailto:katie.birch@state.co.us">katie.birch@state.co.us</a> <a href="mailto:robert.harris@state.co.us">robert.harris@state.co.us</a>  <u>Counsel:</u> Elizabeth Joyce 1300 Broadway Denver, CO 80203 720-508-6761 <a href="mailto:elizabeth.joyce@coag.gov">elizabeth.joyce@coag.gov</a>

/s/ John Watson  
John Watson

## 15. Applications for Party Status

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**REQUEST OF COLORADO RIVER WATER CONSERVATION DISTRICT FOR PARTY STATUS**

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**PUBLIC RULEMAKING HEARING FOR CONSIDERATION OF AMENDMENTS TO RULES CONCERNING THE COLORADO INSTREAM FLOW AND NATURAL LAKE LEVEL PROGRAM (2-CCR 408-2 Rules)**

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The Colorado River Water Conservation District (hereinafter “River District”), requests party status to the January 26, 2021 public rulemaking hearing for consideration of the amendment to C.R.S. §37-83-105 (2019) which governs temporary loans of water for instream flow (“ISF”) uses.

1. Facts entitling the River District to Party Status. Pursuant to its Organic Act, the River District is “an appropriate agency for the conservation, use, and development of the water resources of the Colorado River and its principal tributaries” which is directed “to safeguard for Colorado, all waters to which the state of Colorado is equitably entitled under the Colorado River Compact”. C.R.S. § 37-46-101. The River District was an active participant in the legislative process that lead to House Bill 20-1157.
2. Nature of Evidence to be Presented. The River District may wish to provide written or oral testimony at the hearing.
3. Conclusion. For the reasons stated above, the River District requests that it be granted party status to the January 26, 2021 public rulemaking hearing. Please direct all correspondence in this matter to Peter C. Fleming, Jason V. Turner, and Lorra Nichols (see contact information below).

Respectfully submitted on November 13, 2020.



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Peter C. Fleming, General Counsel  
Jason V. Turner, Senior Counsel  
Colorado River Water Conservation District  
P.O. Box 1120  
Glenwood Springs, Colorado 81602  
Phone: (970) 945-8522  
Fax: (970) 945-8799  
E-mail: [pfleming@crwcd.org](mailto:pfleming@crwcd.org)  
[jturner@crwcd.org](mailto:jturner@crwcd.org)  
[lnichols@crwcd.org](mailto:lnichols@crwcd.org)

BEFORE THE COLORADO WATER  
CONSERVATION BOARD

1313 Sherman St, #718  
Denver, CO 80203

Amy Beatie, Hearing Officer  
[amy.beatie@coag.gov](mailto:amy.beatie@coag.gov)

**IN THE MATTER OF THE RULEMAKING  
CONCERNING THE COLORADO INSTREAM  
FLOW AND NATURAL LAKE LEVEL PROGRAM  
2 CCR 408-2 AND HOUSE BILL 20-1157**

*Attorneys for the City of Aurora, acting by and through  
its Utility Enterprise,*  
**HAMRE, RODRIGUEZ, OSTRANDER & DINGESS, P.C.**

Address: John M. Dingess, #12239  
3600 S. Yosemite Street, Suite 500  
Denver, Colorado 80237-1829  
Phone: (303) 779-0200  
FAX: (303) 779-3662  
E-mail: [mail@hrodllaw.com](mailto:mail@hrodllaw.com)  
[jdingess@hrodllaw.com](mailto:jdingess@hrodllaw.com)

**REQUEST FOR PARTY STATUS OF THE CITY OF AURORA, COLORADO, ACTING  
BY AND THROUGH ITS UTILITY ENTERPRISE**

The City of Aurora, Colorado, acting by and through its Utility Enterprise ("Aurora"), through its undersigned legal counsel, respectfully requests PARTY STATUS in the above captioned Rulemaking before the Colorado Water Conservation Board.

**1. NAME, MAILING ADDRESS AND TELEPHONE NUMBER OF REQUESTING  
PARTY.**

The City of Aurora, Colorado,  
acting by and through its Utility Enterprise  
15151 East Alameda Parkway, Suite 3600  
Aurora, Colorado 80012-1555  
Telephone: 303-739-7370  
Email: [AuroraWater@auroragov.org](mailto:AuroraWater@auroragov.org)



## **2. CONTACT PERSON.**

### Aurora Staff Contact

Erich Fowler  
15151 E. Alameda Parkway, Suite 3600  
Aurora, Colorado 80012-1555  
Telephone: 303-739-7467  
Email: [esfowler@auroragov.org](mailto:esfowler@auroragov.org)

Please send all correspondence and other communications to the referenced legal counsel.

## **3. INTEREST IN PROPOSED AMENDMENTS TO RULES.**

- 3.1. Aurora is the owner and claimant of numerous water rights arising in and flowing through the South Platte, Arkansas, and Colorado River Basins. Such water rights are the mainstay of Aurora's municipal water supply system currently supplying a population of approximately 380,000. Aurora, as owner and claimant of such water rights, has a direct interest in and may be adversely impacted by the adoption of the Rules as proposed.
- 3.2. In determining the appropriateness of any acquisition of existing water rights (2 CCR 408-2 6e.) the proposed Rules should require the Board evaluate the then presently decreed use parameters, including but not limited to time of use, amount of use and types of use.
- 3.3. The proposed Rules, again as part of 2 CCR 408-2 6e., should state the Board's determination of how best to utilize acquired water rights or interests in water rights be done consistent with the legal requirements applicable to the acquired rights or interests.
- 3.4. Regarding 2 CCR 408-2 6f. (4), the proposed Rules should provide any determination by the Division Engineer of administrability should be reviewable by the applicable Water Court.
- 3.5. Regarding 2 CCR 408-2 6h., the proposed Rules should provide that if the seller, lessor, lender or donor of the water desires to bring about beneficial use of the historical consumptive use of the acquired water right downstream of the ISF reach as fully consumable reusable water, the seller may do so only in priority pursuant to the water court decree authorizing the Board to use the acquired water.
- 3.6. Regarding 2 CCR 408-2 6i., to be consistent with law, subparts (1) & (2) of the proposed Rules should reflect the Water Court determines, rather than verifies, quantification of historical consumptive use and return flows.

- 3.7. Regarding 2 CCR 408-2 6i., subpart (3) to be consistent with law, the proposed Rules should reflect Board may seek amendment of the subject change decree, if required by law or the Division Engineer.
- 3.8. Regarding 2 CCR 408-2 6i., to be consistent with law, the proposed Rules should include a new subpart (c) requesting of the Water Court such other terms and conditions as necessary and proper to prevent injury.
- 3.9. Regarding 2 CCR 408-2 6k., to be consistent with law, the proposed Rules should state Section 37-83-105, C.R.S. authorizes the Board to accept and exercise two types of temporary loans of water for ISF use pursuant to a decreed CWCB instream flow right.
- 3.10. Aurora requests the right to elucidate further points at any time when more information becomes known.

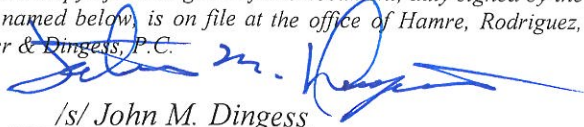
#### **4. GENERAL NATURE OF EVIDENCE OR INFORMATION.**

Evidence and information provided by Aurora will generally include documentation of Aurora's water rights as may be required, testimony of Aurora staff concerning potential injury and the need for further clarification of the proposed Rules, and legal analysis of Colorado water law, the provisions of 20 HB-1157 and the proposed Rules.

Respectfully submitted this 10<sup>th</sup> day of November, 2020.

HAMRE, RODRIGUEZ, OSTRANDER  
& DINGESS, P.C.

*The physical copy of the original of this document, duly signed by the attorney named below, is on file at the office of Hamre, Rodriguez, Ostrander & Dingess, P.C.*


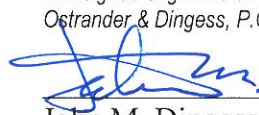
By:   
\_\_\_\_\_  
John M. Dingess, No. 12239

### CERTIFICATE OF E-SERVICE

I hereby certify that on this 10<sup>th</sup> day of November, 2020, a true and correct copy of the foregoing **REQUEST FOR PARTY STATUS OF THE CITY OF AURORA, COLORADO, ACTING BY AND THROUGH ITS UTILITY ENTERPRISE** was electronically transmitted to the following:

Linda Bassi, Esq.      [linda.bassi@state.co.us](mailto:linda.bassi@state.co.us)

*The signed original is on file in the Law Offices of Hamre, Rodriguez,  
Ostrander & Dingess, P.C.*

  
\_\_\_\_\_  
John M. Dingess

**BEFORE THE COLORADO WATER CONSERVATION BOARD  
DEPARTMENT OF NATURAL RESOURCES, STATE OF COLORADO**

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**IN THE MATTER OF THE RULEMAKING HEARING FOR CONSIDERATION OF THE  
PROPOSED RULES TO IMPLEMENT HOUSE BILL 20-1157**

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**APPLICATION FOR PARTY STATUS OF TROUT UNLIMITED**

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Trout Unlimited hereby submits this Application for Party Status to participate in the Colorado Water Conservation Board's (the "CWCB") rulemaking hearing concerning its proposed rules to implement House Bill 20-1157.

**I. Introduction**

House Bill 20-1157 was passed in the 2020 session of the Colorado General Assembly to amend several provisions of section 37-83-105, C.R.S., which provides the CWCB's authority to accept temporary loans of water for instream flow purposes to preserve the environment to a reasonable degree. Prior to the passage of this legislation, the statute allowed water users to loan water to the CWCB for up to one-hundred twenty days in up to three calendar years during a ten-year period. Water users could not reapply for a subsequent loan after the expiration of the initial three years in ten period. The amended statute allows the loans to operate in up to five years during a ten-year period and authorizes the parties to renew the loan for up to two additional ten-year periods. The amended statute will also allow for the CWCB to accept loans of water to both protect and improve the natural environment to a reasonable degree on stream reaches with a decreed instream flow water right. House Bill 20-1157 directed the CWCB to promulgate rules that will govern its review and acceptance of loans proposed pursuant to section 37-83-105, C.R.S. At the rulemaking hearing, scheduled for January 26, 2021 the CWCB will consider the rules that its staff has proposed pursuant to that statutory directive.

**II. Trout Unlimited's interest in the proposed rules**

Trout Unlimited is interested in the proposed rules because they will directly impact its work and mission. Trout Unlimited's mission is to conserve and restore coldwater fisheries and the rivers and streams they inhabit. In Colorado, Trout Unlimited works with landowners, water users, and communities to ensure that both people and nature thrive. We work extensively with water users in the Colorado River Basin to improve flows for fish, wildlife, and recreation. We have used a number of legal tools to facilitate this work, including loans made pursuant to section 37-83-105, C.R.S. Trout Unlimited's interest in the proposed rules stems from the opportunity for the amended section to directly benefit its mission to conserve waters and Trout Unlimited's interest in continuing to facilitate loans made pursuant to the amended section 37-83-105, C.R.S. in the future.

**III. Description of the general nature of the information that Trout Unlimited will present in the course of the proceedings**

Trout Unlimited worked with partners to develop and advocate in support of House Bill 20-1157 because it provides a needed tool to improve stream flows through voluntary arrangements with water users and reduces arbitrary limitations on the use of property rights. In addition, the bill expanded notice requirements to ensure that water users have appropriate opportunities to engage and ensure that injury is

## EXHIBIT E

avoided. The amended statute is consistent with the underlying objectives of 37-83-105, C.R.S and will allow for additional participation by water users and further improvements to Colorado's rivers in the face of drought and climate change. Trout Unlimited supports the CWCB staff's proposed rules, which are consistent with the General Assembly's intent as provided by the language in House Bill 20-1157. Trout Unlimited seeks party status in order to testify in support of the CWCB staff's proposed rules.

#### **IV. Contact person**

For purposes of this application for party status and Trout Unlimited's participation in the rulemaking hearing, Drew Peternell, Trout Unlimited's Colorado Water Program Director, should be considered the contact person. Contact information for Mr. Peternell is provided below.

Respectively submitted this 12<sup>th</sup> day of November, 2020.

TROUT UNLIMITED



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Drew Peternell  
Trout Unlimited  
Colorado Water Program Director

P.O. Box 4165  
Eagle, Colorado 81631  
Phone: (303) 204-3057  
Email: drew.peternell@tu.org



**COMMUNITY DEVELOPMENT DEPARTMENT**  
**BUILDING – PLANNING – OWTS – CODE COMPLIANCE**

200 S. Spruce Street • PO Box 20,000-5022 • Grand Junction, Colorado • 81502  
Telephone: 970.244.1636 • [www.mesacounty.us](http://www.mesacounty.us)

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11/10/2020

Colorado Water Conservation Board  
Department of Natural Resources  
Ms. Amy Beatie, Board Hearing Officer  
1313 Sherman Street  
Denver, CO 80203

*To be submitted via email to: [amy.beatie@coag.gov](mailto:amy.beatie@coag.gov)*

RE: Colorado Water Conservation Board's Proposed Instream Flow Rules Revisions- Request for Party Status to Rulemaking

Dear Ms. Beatie,

Mesa County, Colorado respectfully requests Party Status for the Colorado Water Conservation Board's Rulemaking for the *Rules Concerning the Colorado Instream Flow and Natural Lake Level Program 2 CCR 408-2*, published in the Colorado Register on October 25, 2020.

As identified in the *Notice of Public Rulemaking Hearing Before the Colorado Water Conservation Board*, Section IV, we submit the following:

- 1. Entity Seeking Party Status:** Mesa County, Colorado
- 2. Contact:** Amber Swasey, Sr. Managing Analyst
- 3. Mailing Address:** Mesa County Community Development,  
PO Box 20,000-5022  
Grand Junction, CO 81502

**Phone:** (970) 244-1762

**Email:** [amber.swasey@mesacounty.us](mailto:amber.swasey@mesacounty.us)

**4. Interest of the entity in the proposed amendments to the Rules:**

Mesa County is a strong advocate in guaranteeing that the existing water rights owned and utilized by many Mesa County residents, many of which are the most senior water rights on the Colorado River, are not infringed upon through water loan programs for instream flow, and further, ensuring that the needs of Western Slope municipalities, agriculture, and recreation are addressed.

**5. Description of the general nature of the evidence or information to be presented in the course of the proceedings:**

Mesa County anticipates presenting evidence and information about the water rights in the Grand Valley and elsewhere in the County, how such water is currently being used, the importance of those water rights to the local economy, and Mesa County's concerns regarding whether or not instream flow requirements and water loan programs will negatively impact those existing uses and the local economy.

Thank you for your consideration of this request. Please contact me should you have any questions or require additional information.

Respectfully,



Amber Swasey

cc: Mesa County Board of County Commissioners  
Peter Baier, Mesa County Administrator  
Patrick Coleman, Mesa County Attorney  
Todd Hollenbeck, Mesa County Community Development Director

**COLORADO WATER CONSERVATION BOARD  
STATE OF COLORADO**

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**IN THE MATTER OF REVISIONS TO CWCB'S RULES CONCERNING THE  
COLORADO INSTREAM FLOW AND NATURAL LAKE LEVEL PROGRAM, 2 CCR  
408-2 ("Rules")**

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**REQUEST FOR PARTY STATUS OF COLORADO PARKS AND WILDLIFE**

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Colorado Parks and Wildlife (CPW) respectfully submits this Request for Party Status in the above-captioned rulemaking hearing.

**I. Identification of Entity Requesting Party Status:**

Colorado Parks and Wildlife

**II. Contact Person, including contact information:**

Katie Birch, Instream Flow Program Coordinator  
6060 Broadway  
Denver, CO 80216  
303-291-7335  
[Katie.birch@state.co.us](mailto:Katie.birch@state.co.us)

CPW requests the following individuals also be included as contacts for this proceeding:

Rob Harris, Water Resources Section Manager  
6060 Broadway  
Denver, CO 80216  
303-291-7550  
[Robert.Harris@state.co.us](mailto:Robert.Harris@state.co.us)

Elizabeth Joyce, Assistant Attorney General  
1300 Broadway  
Denver, CO 80203  
720-508-6761  
[Elizabeth.joyce@coag.gov](mailto:Elizabeth.joyce@coag.gov)

**III. Interest in the Proposed Revisions to the Rules:**

CPW's mission is to perpetuate the wildlife resources of the state, provide a quality state park system, and provide enjoyable and sustainable outdoor recreation opportunities that educate and inspire current and future generations to serve as active stewards of Colorado's natural



resources. CPW also has a statutorily prescribed role in support of CWCB's Instream Flow and Natural Lake Level Program, which is further incorporated in the Rules proposed to be amended. CPW's interest in this proceeding is to support CWCB's programs, to provide biological expertise and recommendations as needed, and to ensure that any amendments to the Rules remain consistent with CPW's role to provide biological data and support to CWCB.

IV. Description of Evidence or Information to be Presented:

CPW will provide information or evidence as needed to clarify CPW's role in the Instream Flow and Natural Lake Level Programs, to respond to issues as requested by CWCB, or to respond to issues raised by other parties in this proceeding.

**FOR COLORADO PARKS AND WILDLIFE**



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Kathryn Birch, Instream Flow Program Coordinator  
Colorado Parks and Wildlife  
6060 Broadway  
Denver, Colorado 80216

**BEFORE THE COLORADO WATER CONSERVATION BOARD  
DEPARTMENT OF NATURAL RESOURCES, STATE OF COLORADO**

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**IN THE MATTER OF THE RULEMAKING HEARING FOR CONSIDERATION OF  
AMENDMENTS TO THE COLORADO WATER CONSERVATION BOARD'S RULES  
CONCERNING THE COLORADO INSTREAM FLOW AND NATURAL LAKE LEVEL  
PROGRAM, 2 CCR 408-2**

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**APPLICATION FOR PARTY STATUS OF THE COLORADO WATER TRUST**

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The Colorado Water Trust hereby submits this Application for Party Status to participate in the public rulemaking hearing before the Colorado Water Conservation Board ("CWCB" or "Board") for consideration of amendments to the Rules Concerning the Colorado Instream Flow and Natural Lake Level Program, 2 CCR 408-2 ("ISF Rules").

**I. Introduction**

House Bill 20-1157 amended several subsections of section 37-83-105, C.R.S., which provides authority to the CWCB to accept temporary loans of water rights and to engage in administrative proceedings to temporarily change the use of those water rights for instream flow purposes. Since 2002, the section 37-83-105 legislative authority, which is often referred to as the CWCB's "Temporary Loan Program," has allowed water users to loan water rights to the CWCB for instream flow use in three years during a ten year period. The amended statute allows the loans to operate in up to five years during a ten year period and authorizes loan renewals for up to two additional ten year periods. Further, the amended statute will allow the CWCB to use the loaned water at rates that will protect and improve the natural environment to a reasonable degree on stream reaches with a decreed instream flow water right once the CWCB amends the ISF Rules.

CWCB Staff drafted amended ISF Rules that implement provisions of House Bill 20-1157 and that update references to the CWCB website and to Colorado Parks and Wildlife. At the rulemaking scheduled for hearing on January 26, 2021, and for which the Colorado Water Trust seeks party status, the Board will consider the proposed changes to the ISF Rules.

**II. The Colorado Water Trust's interest in the proposed rules.**

The proposed rules will directly impact the work of the Colorado Water Trust. The Colorado Water Trust works with water users to develop and steward projects that restore water to Colorado's rivers and streams in need. In so doing, the Colorado Water Trust frequently works with the CWCB and employs a variety of statutory tools implemented pursuant to the ISF Rules, including the Temporary Loan Program. The Colorado Water Trust will continue to utilize the Temporary Loan Program as implemented by the CWCB pursuant to its ISF Rules in the future and, consequently, has a strong interest in the proposed rules.

**III. Description of the general nature of the information that the Colorado Water Trust will present in the course of the proceedings.**

The Colorado Water Trust will present statements and testimony in support of the CWCB Staff's proposed ISF Rules because they provide clarification for implementing the Temporary Loan Program,

because the proposed rules are consistent with the statutory language and with the General Assembly's intent in amending the statute, and because the proposed rules correctly update references to the CWCB website and Colorado Parks and Wildlife. The Colorado Water Trust supported House Bill 20-1157 in the legislative session because the expanded Temporary Loan Program provides water users with greater flexibility to voluntarily loan water to the CWCB for instream flow use and provides greater streamflow restoration opportunities, all while maintaining protection to other water rights on Colorado's rivers. The Colorado Water Trust will provide information on its past experiences under the ISF Rules and the Temporary Loan Program and can describe how, based on that experience, it anticipates the amended ISF Rules will operate.

#### **IV. Contact person.**

For purposes of this application for party status and the Colorado Water Trust's participation in the rulemaking hearing, Kate Ryan, Senior Staff Attorney for the Colorado Water Trust, should be considered the contact person. The appropriate mailing address, phone number, and email address at which to reach her are listed in the signature block below.

Respectively submitted this 9<sup>th</sup> day of November, 2020.

THE COLORADO WATER TRUST

A handwritten signature in black ink, appearing to read 'Kate Ryan', is written over a horizontal line.

Kate Ryan, Esq.

3264 Larimer Street, Suite D  
Denver, CO 80205  
Phone: (720) 570-2897  
Email: [kryan@coloradowatertrust.org](mailto:kryan@coloradowatertrust.org)

SENIOR STAFF ATTORNEY FOR THE COLORADO  
WATER TRUST

**BEFORE THE COLORADO WATER CONSERVATION BOARD  
DEPARTMENT OF NATURAL RESOURCES, STATE OF COLORADO**

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**IN THE MATTER OF THE RULEMAKING HEARING FOR CONSIDERATION OF THE  
PROPOSED RULES TO IMPLEMENT HOUSE BILL 20-1157**

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**APPLICATION FOR PARTY STATUS OF THE NATURE CONSERVANCY**

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The Nature Conservancy hereby submits this Application for Party Status to participate in the Colorado Water Conservation Board's (the "CWCB") rulemaking hearing concerning its proposed rules to implement House Bill 20-1157.

**I. Introduction**

House Bill 20-1157 was passed in the 2020 session of the Colorado General Assembly to amend several provisions of section 37-83-105, C.R.S., which provides the CWCB's authority to accept temporary loans of water for instream flow purposes to preserve the environment to a reasonable degree. Prior to the passage of this legislation, the statute allowed water users to loan water to the CWCB for up to one-hundred twenty days in up to three calendar years during a ten-year period. Water users could not reapply for a subsequent loan after the expiration of the initial three years in ten period. The amended statute allows the loans to operate in up to five years during a ten-year period and authorizes the parties to renew the loan for up to two additional ten-year periods. The amended statute will also allow for the CWCB to accept loans of water to both protect and improve the natural environment to a reasonable degree on stream reaches with a decreed instream flow water right. House Bill 20-1157 directed the CWCB to promulgate rules that will govern its review and acceptance of loans proposed pursuant to section 37-83-105, C.R.S. At the rulemaking hearing, scheduled for January 26, 2021 the CWCB will consider the rules that its staff has proposed pursuant to that statutory directive.

**II. The Nature Conservancy's interest in the proposed rules.**

The Nature Conservancy is interested in the proposed rules because they will directly impact its work and mission. The Nature Conservancy's mission is to conserve the lands and waters on which all life depends. In Colorado, The Nature Conservancy works with landowners, water users, and communities to ensure that both people and nature thrive. We work extensively with water users in the Colorado River Basin to improve flows for fish, wildlife, and recreation. We have used a number of legal tools to facilitate this work, including loans made pursuant to section 37-83-105, C.R.S in partnership with the Upper Yampa Water Conservancy District, the City of Steamboat Springs, the Colorado Water Trust, and the Yampa River Fund to improve flows in the Yampa River below Stagecoach Reservoir. The Nature Conservancy's interest in the proposed rules stems from the opportunity for the amended section to directly benefit its mission to conserve waters and the Conservancy's interest in continuing to facilitate loans made pursuant to the amended section 37-83-105, C.R.S. in the future.

**III. Description of the general nature of the information that The Nature Conservancy will present in the course of the proceedings.**

The Nature Conservancy worked with partners to develop and advocate in support of House Bill 20-1157 because it provides a needed tool to improve stream flows through voluntary arrangements with water

# EXHIBIT A

users and reduces arbitrary limitations on the use of property rights. In addition, the bill expanded notice requirements to ensure that water users have appropriate opportunities to engage and ensure that injury is avoided. The amended statute is consistent with the underlying objectives of 37-83-105, C.R.S and will allow for additional participation by water users and further improvements to Colorado's rivers in the face of drought and climate change. The Nature Conservancy supports the CWCB staff's proposed rules, which are consistent with the General Assembly's intent as provided by the language in House Bill 20-1157. The Nature Conservancy seeks party status in order to testify to such in support of the CWCB staff's proposed rules.

## **IV. Contact person.**

For purposes of this application for party status and The Nature Conservancy's participation in the rulemaking hearing, Aaron Citron, Natural Resources Policy Advisor for The Nature Conservancy in Colorado, the signee below, should be considered the contact person. The appropriate mailing address, phone number, and email address, at which to reach him, are listed in the address block below.

Respectively submitted this ninth day of November, 2020.

THE NATURE CONSERVANCY



---

Aaron Citron

2424 Spruce Street  
Boulder, CO 80302  
Phone: (520)730-3421  
Email: [aaron.citron@tnc.org](mailto:aaron.citron@tnc.org)

NATURAL RESOURCES POLICY ADVISOR FOR  
THE NATURE CONSERVANCY, COLORADO

**BEFORE THE COLORADO WATER CONSERVATION BOARD  
DEPARTMENT OF NATURAL RESOURCES, STATE OF COLORADO**

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**IN THE MATTER OF THE RULEMAKING HEARING FOR CONSIDERATION OF THE  
PROPOSED RULES TO IMPLEMENT HOUSE BILL 20-1157**

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**APPLICATION FOR PARTY STATUS OF WESTERN RESOURCE ADVOCATES,  
CONSERVATION COLORADO, AND THE NATIONAL AUDUBON SOCIETY**

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Western Resource Advocates, Conservation Colorado, and the National Audubon Society (collectively, “Applicants”) hereby jointly submit this Application for Party Status to participate in the Colorado Water Conservation Board’s (the “CWCB”) rulemaking hearing concerning its proposed rules to implement House Bill 20-1157 (the “Rulemaking Hearing”).

**I. Introduction**

House Bill 20-1157 was passed in the 2020 session of the Colorado General Assembly to amend several provisions of C.R.S. § 37-83-105 (2019), which authorizes the CWCB to accept temporary loans of water for instream flow purposes. Prior to the passage of House Bill 20-1157, C.R.S. § 37-83-105 allowed water users to loan water to the CWCB for up to one-hundred twenty days in up to three calendar years during a ten-year period. House Bill 20-1157, *inter alia*, amends C.R.S. § 37-83-105 to allow water users to loan water to the CWCB for up to five years during a ten-year period, authorizes the parties to renew such loan for up to two additional ten-year periods, and allows the CWCB to accept loans of water to both protect and improve the natural environment to a reasonable degree.

House Bill 20-1157 also directs the CWCB to promulgate rules that will govern its review and acceptance of loans pursuant to section 37-83-105, C.R.S. At the Rulemaking Hearing, scheduled for January 26, 2021, the CWCB will conduct a hearing to hear argument, review evidence and consider rules proposed pursuant to that statutory directive.

**II. Applicants’ Contact Person.**

For purposes of this application for party status and Applicants’ subsequent participation in the rulemaking hearing only, John Cyran, Senior Staff Attorney for Western Resource Advocates, Healthy Rivers Program, shall be Applicants’ contact person. The appropriate mailing address, phone number, and email address for Mr. Cyran are listed in the address block below.

**III. Applicants’ Interest in the Rulemaking Hearing.**

The Applicants are each nonprofit conservation organizations with long histories of successfully working with public and private entities to address issues affecting Colorado’s streams and rivers.

Conservation Colorado works to protect our state’s climate, air, land, water, and communities through organizing, advocacy, and elections. Conservation Colorado has a long and successful history in Colorado of collaborating on key environmental issues, working collectively at the State Capitol, and establishing strategic partnerships. Specifically, Conservation Colorado has a history of working on

# EXHIBIT F

matters pertaining to Colorado streams, including actively participating in past CWCB instream flow matters

The National Audubon Society is an inclusive, nonpartisan bird conservation organization that collaborates with diverse stakeholders to further its mission of protecting birds and the places they need, including Colorado rivers and streams, today and tomorrow. Audubon works throughout the Americas using science, advocacy, education, and on-the-ground conservation. Twenty-three state/regional programs, 41 nature centers, 450+ local chapters, and a broad array of partners give Audubon an unparalleled wingspan that reaches millions of people each year to inform, inspire, and unite diverse communities in conservation action. A nonprofit conservation organization since 1905, Audubon seeks to advance in a world in which people and wildlife thrive.

Western Resource Advocates (“WRA”) is a nonprofit conservation organization dedicated to protecting the Interior West's land, air, and water. We promote river restoration and water conservation, advocate for a clean and sustainable energy future, and protect public lands for present and future generations. WRA engages with water providers, districts, and utilities, state and federal government agencies, and Colorado irrigators to find solutions to meet growing urban water demands while protecting stream flows for fish, wildlife, and recreation. WRA has experience helping western communities meet their legitimate water needs, as well as extensive knowledge of the water delivery systems in the Colorado River Basin. Our members and employees are located throughout the arid and semi-arid states of the Interior West.

The Applicants were proponents of House Bill 20-1157 and are keenly interested in the CWCB’s promulgation of rules governing the Bill’s effectuation. Climate change and recent droughts have spotlighted the need for increased modalities to address low flow events and resultant negative impacts upon the natural environments of our rivers and streams. Models show that climate change and historic drought will continue to affect Colorado in coming years. The average flow of the Colorado River has declined 20 percent over the last 20 years largely due to climate change, which is causing warming temperatures, diminished rainfall, increased evaporation, and a snowpack that’s shrinking and melting earlier.

As proponents of House Bill 20-1157, Applicants worked with partners to develop a suite of tools that can be used to enhance flows during times of drought, while ensuring other water right holders do not incur injury. This resulted in the Colorado General Assembly, through House Bill 20-1157, passing legislation that allow the CWCB to accept loans necessary to address important flow needs of a stream or river, while including a robust review process to condition such loans so as to protect the interests of existing water users. The Applicants’ interest in the Rulemaking Hearing stems from their desire to ensure that the rules adopted by the CWCB to govern its application of House Bill 20-1157 will accurately and fully effectuate the General Assembly’s intent in passing the legislation.

## **IV. General Description of Information the Applicants May in these Proceedings.**

The Applicants worked to develop and advocate in support of House Bill 20-1157 so the Colorado General Assembly might provide the State of Colorado with a needed tool to improve stream flows through voluntary arrangements with water users. House Bill 20-1157 thus not only helps protect Colorado’s streams but reduces arbitrary limitations on the use of property rights, while expanding notice requirements to ensure that water users have appropriate opportunities to prevent injury. Applicants may present information relevant to determining whether rules proposed by CWCB staff or by other parties to the Rulemaking Hearing are consistent with the intent of the General Assembly in passing House Bill 20-1157, such as evidence demonstrating how House Bill 20-1157 provides for increased protection of river

## EXHIBIT F

and stream environments, and information regarding the increasing need for flexible water management tools to address climate change induced effects upon stream flows.

Respectively submitted this 12<sup>th</sup> day of November 2020.

WESTERN RESOURCE ADVOCATES

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John Cyran, #23144

2260 Baseline Road

Boulder, CO 80302

Phone: (303)746-3802

Email: [john.cyran@westernresources.org](mailto:john.cyran@westernresources.org)

Senior Staff Attorney, Healthy Rivers Program

On behalf of Western Resource Advocates,  
Conservation Colorado, and the National Audubon  
Society



## 16. Prehearing Statements

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

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**IN THE MATTER OF THE RULEMAKING HEARING TO REVISE RULES  
CONCERNING THE COLORADO INSTREAM FLOW AND NATURAL LAKE  
LEVEL PROGRAM, 2 CCR 408-2**

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**PREHEARING STATEMENT OF STAFF TO THE COLORADO WATER  
CONSERVATION BOARD**

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Pursuant to the Hearing Officer's November 20, 2020 Order Re: Procedures and Deadlines for Prehearing Submissions, Staff to the Colorado Water Conservation Board ("CWCB Staff") submits the following Prehearing Statement:

**A. Statement of Position**

CWCB Staff recommends the Colorado Water Conservation Board adopt the rules as noticed and proposed on October 14, 2020, and published in the Colorado Register on October 25, 2020. These proposed rule amendments are consistent with the requirements of House Bill 20-1157 and existing ISF rules, and will enable the proper implementation of section 37-83-105, C.R.S (2020) regarding temporary loans of water for instream flow use.

The exercise of temporary loans of water for instream flow use processed under the proposed rule amendments will not negatively impact existing beneficial uses of water rights and will not negatively impact local economies. Further, this rulemaking should be limited in scope to the topics and rule amendments that were noticed and proposed on October 14, 2020 and published in the Colorado Register on October 25, 2020. Any proposed rule amendments outside the scope of the October

14, 2020 Notice of Proposed Rulemaking should be rejected by the Colorado Water Conservation Board.

## **B. Witness List**

1. Linda Bassi, Section Chief of the CWCB Stream and Lake Protection Section (resume included as Appendix A).

i. Ms. Bassi may testify to the following:

1. Any relevant events or circumstances that helped inform the statutory changes contained in House Bill 20-1157;
2. The requirements in House Bill 20-1157, including the requirement that the Board promulgate rules;
3. Development of proposed rules, including public outreach;
4. Proposed revisions to the rules; and
5. Responses to issues and proposed amendments raised by the other parties to this proceeding or in public comment.

ii. Ms. Bassi will be available to answer questions from the Board as required during the rulemaking hearing.

2. Kaylea White, Senior Water Resources Specialist (resume included as Appendix B). Ms. White may also testify to the information contained in B.1.i, and will be available to answer questions from the Board as required during the rulemaking hearing.

### **C. Statement of Open Legal Questions**

To the extent any other party to this rulemaking is requesting rule amendments to rules or provisions that are outside the scope of what was included in the Notice of Proposed Rulemaking, filed on October 14, 2020 and published in the Colorado Register on October 25, 2020, those amendments should be rejected by the Board. Pursuant to subsections 24-4-103(3) and (4)(c), C.R.S., of the state Administrative Procedure Act, “[r]ules, as finally adopted, shall be consistent with the subject matter as set forth in the notice of proposed rule-making.” Because the October 14, 2020 Notice of Proposed Rulemaking included only non-substantive corrections to an outdated website reference and references to Colorado Parks and Wildlife, and revisions to “amend Rules 6k. and 6m. to implement HB 20-1157,” any rule amendments adopted by the Board outside the scope of updating those references and implementing HB 20-1157 would likely be invalidated for failure to comply with the state Administrative Procedure Act.

### **D. Statement of Relief Requested**

CWCB Staff requests the CWCB adopt the rules as noticed, proposed, and published in the Colorado Register. CWCB Staff reserves the right to propose additional rule revisions prior to or at any hearing in this matter.

### **E. Desired Time**

CWCB Staff requests 90 minutes to present any testimony, rebuttal information, and to answer any questions.

## F. Exhibit List

<u>Exhibit Number</u>	<u>Exhibit Name</u>
CWCBStaff-1	House Bill 20-1157
CWCBStaff-2	Section 37-83-105, C.R.S. (effective Sept. 14, 2020)
CWCBStaff-3	Rules Concerning the Colorado Instream Flow and Natural Lake Level Program 2 CCR 408-2
CWCBStaff-4	Notice of Proposed Rulemaking, published in the Colorado Register on October 25, 2020
CWCBStaff-5	Proposed Rule Amendments to Rules Concerning the Colorado Instream Flow and Natural Lake Level Program, 2 CCR 408-2
CWCBStaff-6	Statement of Basis and Purpose

Dated this 10th day of December, 2020.

PHIL WEISER  
Attorney General

/s/ Jen Mele

JEN MELE, #30720

First Assistant Attorney General

MARC SARMIENTO, #46322

ALLISON ROBINETTE, #49930

Assistant Attorneys General

Natural Resources & Environment Section

Attorneys for the Staff to the Colorado Water Conservation Board

\*Counsel of Record

## **CERTIFICATE OF SERVICE**

I hereby certify that I have duly served the copies of the foregoing **Prehearing Statement of the Staff to the Colorado Water Conservation Board** upon all parties herein by email, this 10th day of December, 2020, addressed as follows:

### **Hearing Officer**

Amy Beatie  
Deputy Attorney General  
Natural Resources & Environment Section  
Office of the Colorado Attorney General  
1300 Broadway, 7th Floor  
Denver, Colorado 80203  
720-508-6296  
Email: [Amy.Beatie@coag.gov](mailto:Amy.Beatie@coag.gov)  
  
Copy to: [john.watson@coag.gov](mailto:john.watson@coag.gov)

### **Rulemaking Parties**

<u>Staff to the Colorado Water Conservation Board</u> Linda Bassi Colorado Water Conservation Board 1313 Sherman Street, Room 718 Denver, CO 80203 303-866-3441, ext. 3204 Email: <a href="mailto:linda.bassi@state.co.us">linda.bassi@state.co.us</a>	<u>The Nature Conservancy</u> Aaron Citron 2424 Spruce Street Boulder, CO 80302 520-730-3421 Email: <a href="mailto:aaron.citron@tnc.org">aaron.citron@tnc.org</a>
<u>Colorado Water Trust</u> Kate Ryan 3264 Larimer Street, Suite D Denver, CO 80205 720-570-2897 Email: <a href="mailto:kryan@coloradowatertrust.org">kryan@coloradowatertrust.org</a>	<u>City of Aurora</u> <i>Counsel:</i> John M. Dingess 3600 S. Yosemite Street, Suite 500 Denver, CO 80237 303-779-0200 Email: <a href="mailto:jdiness@hrodllaw.com">jdiness@hrodllaw.com</a> ; <a href="mailto:mail@hrodllaw.com">mail@hrodllaw.com</a>

	<p><i>Staff Contact:</i></p> <p>Erich Fowler  15151 E. Alameda Parkway, Suite 3600  Aurora, CO 80012  303-739-7467  Email: <a href="mailto:esfowler@auroragov.org">esfowler@auroragov.org</a></p>
<p><u>Mesa County, Colorado</u></p> <p>Amber Swasey  Mesa County Community Development  P.O. Box 20,000-5022  Grand Junction, CO 81502  970-244-1762  Email: <a href="mailto:amber.swasey@mesacounty.us">amber.swasey@mesacounty.us</a></p>	<p><u>Trout Unlimited</u></p> <p>Drew Peternell  Trout Unlimited  P.O. Box 4165  Eagle, CO 81631  303-20-3057  Email: <a href="mailto:drew.peternell@tu.org">drew.peternell@tu.org</a></p>
<p><u>Western Resource Advocates,  Conservation Colorado, and the  National Audubon Society</u></p> <p>John Cyran  2260 Baseline Road  Boulder, CO 80302  303-746-3802  Email:  <a href="mailto:john.cyran@westernresources.org">john.cyran@westernresources.org</a></p>	<p><u>Colorado River Water Conservation  District</u></p> <p>Peter C. Fleming  Jason V. Turne  Lorra Nichols  Colorado River Water Conservation  District  P.O. Box 1120  Glenwood Springs, CO 81602  970-945-8522  Email: <a href="mailto:pfleming@crwcd.org">pfleming@crwcd.org</a>  <a href="mailto:jturner@crwcd.org">jturner@crwcd.org</a>  <a href="mailto:lnichols@crwcd.org">lnichols@crwcd.org</a></p>
<p><u>Colorado Parks and Wildlife</u></p> <p><i>Counsel:</i></p> <p>Elizabeth Joyce  1300 Broadway, 7th Floor  Denver, CO 80203  720-508-6761  Email: <a href="mailto:elizabeth.joyce@coag.gov">elizabeth.joyce@coag.gov</a></p>	



<i>Staff Contacts:</i> Katie Birch Rob Harris 6060 Broadway Denver, CO 80216 303-291-7335 303-291-7550 Email: <a href="mailto:katie.birch@state.co.us">katie.birch@state.co.us</a> <a href="mailto:robert.harris@state.co.us">robert.harris@state.co.us</a>	
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/s/\_\_\_\_\_

Margaret Popick

**LINDA J. BASSI**  
**COLORADO WATER CONSERVATION BOARD**  
**1313 SHERMAN STREET, ROOM 721, DENVER, CO 80203**  
**(303) 866-3441**

**BAR ADMISSIONS**

Admitted to Colorado Bar, October 1994.

**EDUCATION**

**Illinois Institute of Technology Chicago-Kent College of Law** Chicago, IL  
**Juris Doctorate, May 1994**

**Columbia College** Chicago, IL  
**Bachelor of Arts with honors in Photography, January 1984**

**PROFESSIONAL EXPERIENCE**

**Colorado Water Conservation Board** Denver, CO  
**Chief, Stream and Lake Protection Section** September 2007 – present

Supervise, lead, and coordinate with Section staff on all aspects of the Instream Flow (“ISF”) Program, including rulemaking, legislative efforts, ISF appropriations, acquisitions and opposition cases, and participation in various stakeholder group processes.

**Colorado Water Conservation Board** Denver, CO  
**Legal and Physical Protection Specialist** September 2004 – August 2007

Worked on legal protection of ISF water rights; monitoring and enforcement of ISF water rights; acquisitions of water, water rights, and interests in water for ISF use; and development of policies concerning the ISF Program. Proposed, drafted and advocated for legislation to clarify and further all aspects of the ISF Program.

**Colorado Dept. of Law, Natural Resources and Environment Section** Denver, CO  
**First Assistant Attorney General, Water Rights Unit** July 2001—August 2004  
**Assistant Attorney General, Water Rights Unit** June 1995—July 2001

While First Assistant AG, supervised eight attorneys and four classified employees. As First and as Assistant AG, represented the CWCB in ISF water rights litigation, new appropriation proceedings, and acquisitions of water rights for ISF use. Assisted the CWCB and Division of Water Resources in developing and drafting policies and rules concerning water rights administration, CWCB loans, the ISF Program, and other water matters. Negotiated rules revisions with interested parties, advised clients on rulemaking procedures, and represented clients at rulemaking hearings. Drafted and reviewed legislation, and testified at legislative hearings on behalf of clients and the Attorney General.

**HONORS**

- Attorney General’s Legacy Award, 2020.
- Division of Water Resources Water Unit Attorney of the Year Award, 1997.

## **PUBLICATIONS**

- John J. Cyran, Linda Bassi and Ted Kowalski, “The City of Central Decision, Victory for Colorado’s Instream Flow Program, Colorado’s Prior Appropriation System, and Colorado,” 10 U. Denv. Water L. Rev. 259 (Spring 2007).
- Linda J. Bassi, Susan J. Schneider, and Kaylea M. White, “ISF Law – Stories about the Origin and Evolution of Colorado’s Instream Flow Law in this Prior Appropriation State,” 22 U. Denv. Water L. Rev. 389 (Spring 2019).

## KAYLEA M. WHITE

1313 Sherman St., Suite 719, Denver, CO • 80203 • phone (303) 866-3441 X3240 • kaylea.white@state.co.us

### LICENSES AND REGISTRATIONS

**Colorado Licensed Attorney**, #36917, 2005, (*currently inactive*)  
**Registered Geologist**, California # 5460, 1989  
**Certified Hydrogeologist**, California # 80, 1992  
**Private Pilot, VFR rating**, Mammoth Mtn Airport, California, 1998  
**Wilderness First Responder and First Aid**, National Certificates, 1998

### EDUCATION

**Vermont Law School**, South Royalton, VT. **Juris Doctorate**, Aug 2002-May 2005  
**University of California**, Santa Barbara, CA. PhD Student in Donald Bren School of Environmental Science & Management, 1999-2001. Left PhD program to pursue a law degree.  
**California State University**, Fresno, CA. **Master of Science**, Hydro & Engineering Geology, 1989-1993  
**Trinity University**, San Antonio, TX. **Bachelor of Science**, Geology/Earth Science, 1981-1985

### PROFESSIONAL EXPERIENCE

**Colorado Water Conservation Board**, Denver, CO. *Senior Water Resources Specialist*, 2008-present  
Manager of the program areas for legal protection and acquisitions of water rights in the Stream and Lake Protection Section of CWCB. Assist with rulemaking and legislative efforts. Provided expert testimony in Donala Water and Sanitation District, 2-09CW73, March 9, 2011.

**Lind, Lawrence & Ottenhoff**, Windsor, CO. *Associate Attorney*, 2006-2008  
Lead attorney in water court litigation, including settlement negotiations, depositions and trial preparations.

**S.S. Papadopoulos & Assoc., Inc.**, San Francisco, CA. *Senior Project Hydrologist*, 2002  
Responsible for marketing and development of water resources business; Provided consulting expert witness support for copper mine waste litigation.

**Western Water Consulting**, San Francisco, CA. *Owner/Water Resources Consultant*, 1997-2001  
Assistant Project Coordinator for National Railroad Merger NEPA compliance EIS for the US Surface Transportation Board; water resources specialist for EIS impact analysis performed for the Central Utah Project Completion Act.

**Montgomery Watson**, Sacramento, CA. *Senior Water Resources Project Manager*, 1993-97  
Wrote NEPA EIS and CEQA EIR documents for environmental impacts of major future water supply projects for local and federal water agencies including USBR, USACE, East Bay MUD; Designed and implemented analytical water supply models with IGSM (Integrated Groundwater and Surface water Model).

**California Department of Water Resources (DWR)**, Fresno, CA. *Engineering Geologist*, 1988-93  
Established the Kern Water Bank model of GW/SW aquifer storage and recovery water supply project for the State Water Project using MODFLOW; DWR representative for Salinas Basin water plan, including saline water intrusion management.

**HWS Consulting**, Lincoln, NE. *Staff Geologist*, 1986-88  
Managed technical groundwater contamination remediation projects.

**H.E. White – Petroleum Geologist**, Austin, TX. *Geologist*, 1985-86  
Assisted with oil and gas exploration, drilling, and mapping.

### PUBLICATIONS

- Linda J. Bassi, Susan J. Schneider, and Kaylea M. White, “ISF Law – Stories about the Origin and Evolution of Colorado’s Instream Flow Law in this Prior Appropriation State,” 22 U. Denv. Water L. Rev. 389 (Spring 2019).

## Appendix B

# An Act

HOUSE BILL 20-1157

BY REPRESENTATIVE(S) Roberts and Will, Arndt, Bird, Buentello, Cutter, Duran, Esgar, Exum, Froelich, Kennedy, Kipp, McCluskie, McKean, McLachlan, Michaelson Jenet, Sandridge, Snyder, Soper, Titone, Valdez D., Woodrow, Young, Becker;  
also SENATOR(S) Donovan, Bridges, Gonzales, Hansen, Moreno, Rodriguez, Winter, Zenzinger, Garcia.

CONCERNING THE COLORADO WATER CONSERVATION BOARD'S AUTHORITY  
TO USE WATER THAT A WATER RIGHT OWNER VOLUNTARILY LOANS TO  
THE BOARD FOR INSTREAM FLOW PURPOSES.

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

**SECTION 1.** In Colorado Revised Statutes, 37-83-105, **amend** (1), (2)(a) introductory portion, (2)(a)(IV), (2)(a)(V), (2)(b) introductory portion, (2)(b)(I) introductory portion, (2)(b)(II), (2)(b)(V), (2)(b)(VI), (2)(b)(VII), and (2)(b)(VIII); and **add** (2)(a)(III.5), (2)(a)(III.7), (2)(a)(VI), (2)(b)(II.5), and (3) as follows:

**37-83-105. Owner may loan agricultural water right - loans to Colorado water conservation board for instream flows - rules.**  
(1) (a) Subject to the limitations of this subsection (1) and pursuant to the

*Capital letters or bold & italic numbers indicate new material added to existing law; dashes through words or numbers indicate deletions from existing law and such material is not part of the act.*

procedures set forth in ~~paragraph (b) of subsection (2)~~ SUBSECTION (2)(b) of this section THAT APPLY TO AN EXPEDITED LOAN DESCRIBED IN SUBSECTION (2)(a)(III.7) OF THIS SECTION, the owner of a water right decreed and used solely for agricultural irrigation purposes may loan all or a portion of the water right to another owner of a decreed water right on the same stream system and that is used solely for agricultural irrigation purposes for no more than one hundred eighty days during any one calendar year if the ~~division~~ STATE engineer approves ~~such~~ THE loan in advance and the loan does not cause injury to other decreed water rights.

(b) THE OWNER OF ANY DECREED WATER RIGHT MAY LOAN WATER TO THE COLORADO WATER CONSERVATION BOARD FOR USE AS INSTREAM FLOWS:

(I) TO PRESERVE THE NATURAL ENVIRONMENT TO A REASONABLE DEGREE PURSUANT TO A DECREED INSTREAM FLOW WATER RIGHT HELD BY THE BOARD; OR

(II) TO IMPROVE THE NATURAL ENVIRONMENT TO A REASONABLE DEGREE FOR A STREAM REACH FOR WHICH THE BOARD HOLDS A DECREED INSTREAM FLOW WATER RIGHT.

(2) (a) ~~A water right owner may loan water to the Colorado water conservation board for use as~~ WATER MAY BE USED FOR instream flows pursuant to a ~~decreed instream flow water right held by the board~~ LOAN AUTHORIZED UNDER THIS SECTION for a period not to exceed one hundred twenty days IN A SINGLE CALENDAR YEAR, subject to the following:

(III.5) WATER RIGHTS LOANED PURSUANT TO THIS SECTION 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.

(III.7) AN EXPEDITED LOAN APPROVED TO PRESERVE THE NATURAL ENVIRONMENT TO A REASONABLE DEGREE PURSUANT TO THIS SUBSECTION (2)(a) HAS A TERM OF UP TO ONE YEAR. THE LOAN PERIOD BEGINS WHEN THE STATE ENGINEER APPROVES THE EXPEDITED LOAN. IF AN EXPEDITED LOAN IS APPROVED, THE APPLICANT SHALL NOT REAPPLY FOR AN ADDITIONAL EXPEDITED LOAN OF THE WATER RIGHT.

(IV) (A) A RENEWABLE loan approved TO PRESERVE OR IMPROVE THE NATURAL ENVIRONMENT TO A REASONABLE DEGREE pursuant to this ~~paragraph (a) shall~~ SUBSECTION (2)(a) MUST not be exercised for more than ~~three~~ 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. The ten-year period ~~shall begin~~ BEGINS when the state engineer approves the loan. AN APPLICANT MAY REAPPLY FOR AND the state engineer ~~shall not~~ MAY approve a RENEWABLE loan pursuant to this ~~paragraph (a)~~ SUBSECTION (2)(a) for ~~another~~ UP TO TWO ADDITIONAL ten-year period; ~~except that, if the agreement has not been exercised during the term of the agreement, an applicant may reapply one time by repeating the application process pursuant to this subsection (2)~~ PERIODS.

(B) IF AN APPLICANT HAD PREVIOUSLY BEEN APPROVED FOR AND HAD EXERCISED AN EXPEDITED LOAN PURSUANT TO SUBSECTION (2)(a)(III.7) OF THIS SECTION AND SUBSEQUENTLY APPLIES AND IS APPROVED FOR A RENEWABLE LOAN, THE ONE-YEAR LOAN PERIOD OF THE EXPEDITED LOAN COUNTS AS THE FIRST YEAR OF THE FIVE-YEAR ALLOWANCE FOR THE SUBSEQUENT RENEWABLE LOAN.

(C) IN EACH YEAR THAT A RENEWABLE LOAN IS EXERCISED, THE APPLICANT SHALL PROVIDE THE WRITTEN NOTICE DESCRIBED IN SUBSECTION (2)(b)(II) OF THIS SECTION.

(V) A party may file comments concerning potential injury to ~~such~~ THE party's water rights or decreed conditional water rights due to the operations of the loan of ~~a~~ THE water right ~~to a decreed instream flow right~~ with the state engineer by January 1 of the year following each year that the loan is exercised. The procedures of ~~paragraph (b) of this subsection (2)~~ SUBSECTION (2)(b) OF THIS SECTION regarding notice, opportunity to comment, the state engineer's decision, and an appeal of ~~such~~ THE decision shall again be followed with regard to ~~such~~ THE party's comments. IN AN APPEAL TO THE WATER JUDGE IN THE APPLICABLE WATER DIVISION OF THE DETERMINATION MADE BY THE STATE ENGINEER PURSUANT TO THIS SECTION, THE APPLICANT HAS THE BURDEN OF PROOF THAT THE LOANED WATER RIGHT DOES NOT CAUSE INJURY TO OTHER VESTED OR CONDITIONALLY DECREED WATER RIGHTS. ANY APPEAL OF A DECISION BY THE STATE ENGINEER CONCERNING THE LOAN PURSUANT TO THIS SECTION SHALL BE MADE IN ACCORDANCE WITH THE PROCEDURES SET FORTH IN SUBSECTION (2)(b)(VIII) OF THIS SECTION.

(VI) RULES PROMULGATED BY THE COLORADO WATER CONSERVATION BOARD PURSUANT TO SUBSECTION (3) OF THIS SECTION.

(b) In determining whether injury will occur, the ~~division~~ STATE engineer shall ensure that the following conditions are met:

(I) The ~~proponent~~ APPLICANT has filed a request for approval of the loan with the ~~division~~ STATE engineer, together with a filing fee in the amount of ~~one~~ THREE hundred dollars. ~~Moneys from~~ THE STATE ENGINEER SHALL TRANSMIT the fee ~~shall be transmitted~~ to the state treasurer, ~~and deposited~~ WHO SHALL DEPOSIT THE FEE in the water resources cash fund created in section 37-80-111.7 (1). The request for approval ~~shall~~ MUST include:

(II) The ~~proponent~~ APPLICANT has SUBMITTED PROOF TO THE STATE ENGINEER, IN A FORM AND MANNER DETERMINED BY THE STATE ENGINEER, DEMONSTRATING THAT THE APPLICANT provided written notice of the request for approval of the loan by first-class mail or electronic mail to:

(A) 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 ~~proof of such notice is filed with the division engineer;~~

(B) 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.

(II.5) THE APPLICANT HAS PROVEN THAT THE LOAN WILL NOT INJURE DECREED WATER RIGHTS, DECREED EXCHANGES OF WATER, OR OTHER WATER USERS' UNDECREED EXISTING EXCHANGES OF WATER TO THE EXTENT THAT THE UNDECREED EXISTING EXCHANGES HAVE BEEN ADMINISTRATIVELY APPROVED BEFORE THE DATE OF THE FILING OF THE REQUEST FOR APPROVAL OF THE LOAN.

(V) The ~~division~~ STATE engineer has given the owners of water rights and decreed conditional water rights ~~fifteen days after the date of mailing of notice under subparagraph (II) of this paragraph~~ (b) THE OPPORTUNITY to file comments on the proposed loan ~~except that the division engineer may act on the application immediately after the applicant~~



~~provides evidence that all persons entitled to notice of the application under subparagraph (II) of this paragraph (b) have either consented to or commented on the application. Such~~ WITHIN THE RELEVANT TIME FRAME INDICATED IN THIS SUBSECTION (2)(b)(V). THE comments ~~shall~~ MUST include any claim of injury or any terms and conditions that should be imposed upon the proposed loan to prevent injury to a party's water ~~right~~ RIGHTS and any other information the commenting party wishes the ~~division~~ STATE engineer to consider in reviewing the proposed loan. THE STATE ENGINEER SHALL PROVIDE THE PARTIES ENTITLED TO NOTICE UNDER SUBSECTION (2)(b)(II) OF THIS SECTION:

(A) FIFTEEN DAYS AFTER THE DATE OF MAILING OF NOTICE FOR EXPEDITED LOANS AUTHORIZED UNDER SUBSECTION (2)(a)(III.7) OF THIS SECTION TO PROVIDE COMMENTS ON THE PROPOSED LOAN; AND

(B) SIXTY DAYS AFTER THE DATE OF MAILING OF NOTICE FOR RENEWABLE LOANS AUTHORIZED UNDER SUBSECTION (2)(a)(IV) OF THIS SECTION TO PROVIDE COMMENTS ON THE PROPOSED LOAN.

(VI) The ~~division~~ STATE engineer, after consideration of any comments received, has determined that the operation and administration of the proposed loan will not cause injury to other decreed water rights, DECREED EXCHANGES, OR UNDECREED EXCHANGES AS DESCRIBED IN SUBSECTION (2)(b)(II.5) OF THIS SECTION and, for loans made pursuant to ~~paragraph (a) of this subsection (2)~~ SUBSECTION (2)(a) OF THIS SECTION, will not affect Colorado's compact entitlements. The ~~division~~ STATE engineer shall impose such terms and conditions as are necessary to ensure that these standards are met. In making the determinations specified in this ~~subparagraph (VI)~~ SUBSECTION (2)(b)(VI), the ~~division~~ STATE engineer ~~shall~~ NEED not ~~be required to~~ hold any formal hearings or conduct any other formal proceedings, but may conduct a hearing or formal proceeding if the ~~division~~ STATE engineer finds it necessary to address the issues.

(VII) The ~~division~~ STATE engineer shall approve or deny the proposed loan within ~~twenty~~ TEN days after the ~~date of mailing of notice under subparagraph (II) of this paragraph (b), or within five days after the applicant provides evidence that all persons entitled to notice of the application under subparagraph (II) of this paragraph (b) have either consented to or commented on the application, whichever is earlier~~ PERIOD FOR COMMENTS ON THE PROPOSED LOAN SPECIFIED IN SUBSECTION (2)(b)(V)

OF THIS SECTION HAS EXPIRED.

(VIII) When the ~~division~~ STATE engineer approves or denies a proposed loan, the ~~division~~ STATE engineer shall serve a copy of the decision on all parties to the application by first-class mail or, if ~~such~~ THE parties have so elected, by electronic mail. Neither the approval nor the denial by the ~~division~~ STATE engineer ~~shall create~~ CREATES any presumptions ~~shift the burden of proof, or serve~~ OR SERVES as a defense in any legal action that may be initiated concerning the loan. ~~Any~~ A PARTY MAY FILE AN appeal of a decision by the ~~division~~ STATE engineer concerning the loan pursuant to this section ~~shall be made~~ to the water judge in the applicable water division within fifteen days after the date ~~on which~~ THAT THE STATE ENGINEER, FOLLOWING THE STATE ENGINEER'S CONSIDERATION OF ANY COMMENTS SUBMITTED PURSUANT TO SUBSECTION (2)(a)(V) OF THIS SECTION, SERVES the decision ~~is served~~ on the parties to the application. THE APPLICANT HAS THE BURDEN OF PROOF TO DEMONSTRATE THAT THE LOANED WATER RIGHT DOES NOT CAUSE INJURY TO OTHER VESTED OR CONDITIONALLY DECREED WATER RIGHTS, DECREED EXCHANGES, OR UNDECREED EXCHANGES AS DESCRIBED IN SUBSECTION (2)(b)(II.5) OF THIS SECTION. The water judge shall hear ~~such~~ AND DETERMINE THE appeal on an expedited basis USING THE PROCEDURES AND STANDARDS SET FORTH IN SECTION 37-92-304 (3) CONCERNING MATTERS REREFERRED TO THE WATER JUDGE BY THE WATER REFEREE.

(3) THE COLORADO WATER CONSERVATION BOARD SHALL PROMULGATE RULES REGARDING THE FOLLOWING NECESSARY STEPS FOR ITS REVIEW AND ACCEPTANCE OF LOANS FOR INSTREAM FLOW USE PURSUANT TO SUBSECTION (1)(b)(II) OF THIS SECTION:

(a) THE BOARD'S REVIEW OF THE PROPOSED LOAN, INCLUDING A REQUIREMENT THAT THE BOARD REQUEST AND REVIEW A BIOLOGICAL ANALYSIS FROM THE DIVISION OF PARKS AND WILDLIFE CONCERNING THE EXTENT TO WHICH THE PROPOSED LOAN WILL IMPROVE THE NATURAL ENVIRONMENT TO A REASONABLE DEGREE;

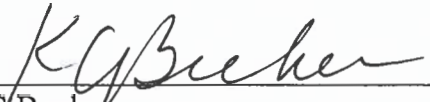
(b) A REQUIREMENT THAT WHEN CONSIDERING A PROPOSED LOAN, THE BOARD SHALL GIVE PREFERENCE TO LOANS OF STORED WATER, WHEN AVAILABLE, OVER LOANS OF DIRECT FLOW WATER; AND

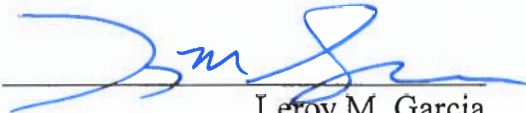
(c) THE BOARD'S DETERMINATION, AFTER A HEARING ON THE

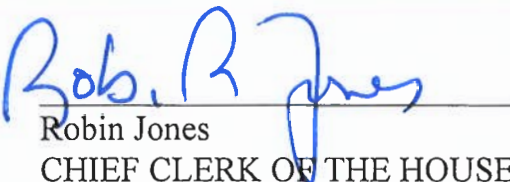
MATTER, IF REQUESTED, WHETHER TO ACCEPT THE PROPOSED LOAN.

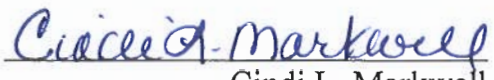
**SECTION 2. Act subject to petition - effective date - applicability.** (1) This act takes effect at 12:01 a.m. on the day following the expiration of the ninety-day period after final adjournment of the general assembly (August 5, 2020, if adjournment sine die is on May 6, 2020); except that, if a referendum petition is filed pursuant to section 1 (3) of article V of the state constitution against this act or an item, section, or part of this act within such period, then the act, item, section, or part will not take effect unless approved by the people at the general election to be held in November 2020 and, in such case, will take effect on the date of the official declaration of the vote thereon by the governor.

(2) This act applies to conduct occurring on or after the applicable effective date of this act.

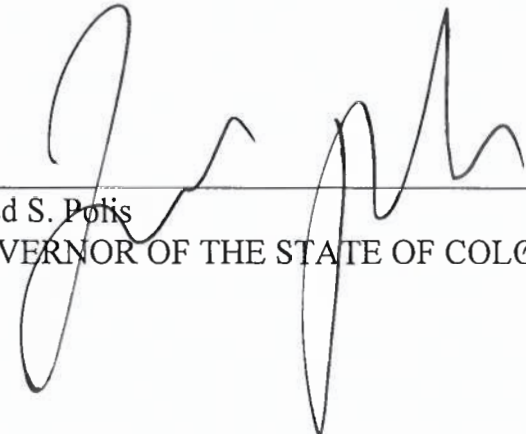
  
KC Becker  
SPEAKER OF THE HOUSE  
OF REPRESENTATIVES

  
Leroy M. Garcia  
PRESIDENT OF  
THE SENATE

  
Robin Jones  
CHIEF CLERK OF THE HOUSE  
OF REPRESENTATIVES

  
Cindi L. Markwell  
SECRETARY OF  
THE SENATE

APPROVED March 20, 2020 at 12:50 pm  
(Date and Time)

  
Jared S. Polis  
GOVERNOR OF THE STATE OF COLORADO

## Document: C.R.S. 37-83-105

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### C.R.S. 37-83-105

#### Copy Citation

Current through all laws passed during the 2020 Legislative Session

**CO - Colorado Revised Statutes Annotated    TITLE 37. WATER AND IRRIGATION    WATER RIGHTS AND IRRIGATION    WATER RIGHTS - GENERALLY    ARTICLE 83. EXCHANGE OF WATER**

#### 37-83-105. Owner may loan agricultural water right - loans to Colorado water conservation board for instream flows - rules

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**(1)** (a) Subject to the limitations of this subsection (1) and pursuant to the procedures set forth in subsection (2)(b) of this section that apply to an expedited loan described in subsection (2)(a)(III.7) of this section, the owner of a water right decreed and used solely for agricultural irrigation purposes may loan all or a portion of the water right to another owner of a decreed water right on the same stream system and that is used solely for agricultural irrigation purposes for no more than one hundred eighty days during any one calendar year if the state engineer approves the loan in advance and the loan does not cause injury to other decreed water rights.

**(b)** The owner of any decreed water right may loan water to the Colorado water conservation board for use as instream flows:

**(I)** To preserve the natural environment to a reasonable degree pursuant to a decreed instream flow water right held by the board; or

**(II)** To improve the natural environment to a reasonable degree for a stream reach for which the board holds a decreed instream flow water right.

**(2)** (a) Water may be used for instream flows pursuant to a loan authorized under this section for a period not to exceed one hundred twenty days in a single calendar year, subject to the following:

**(I)** Prior to accepting the loan, the Colorado water conservation board shall compile a statement about the duration of the loan, a description of the original points of diversion, and other relevant information sufficient for the state engineer to determine that such loan does not injure existing decreed water rights.

**(II)** Consistent with current law, only the Colorado water conservation board is entitled to hold instream flow water rights and may accept proposed loans in accordance with section 37-92-102 (3).

**(III)** The loan shall not be accepted unless the state engineer determines that the Colorado water conservation board's temporary instream flow use will not injure existing water rights of others.

**(III.5)** Water rights loaned pursuant to this section 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.

**(III.7)** An expedited loan approved to preserve the natural environment to a reasonable degree pursuant to this subsection (2)(a) has a term of up to one year. The loan period begins when the state engineer approves the expedited loan. If an expedited loan is approved, the applicant shall not reapply for an additional expedited loan of the water right.

**(IV)** (A) A renewable loan approved to preserve or improve the natural environment to a reasonable degree pursuant to this subsection (2)(a) 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. The ten-year period begins when the state engineer approves the loan. An applicant may reapply for and the state engineer may approve a renewable loan pursuant to this subsection (2)(a) for up to two additional ten-year periods.

**(B)** If an applicant had previously been approved for and had exercised an expedited loan pursuant to subsection (2)(a)(III.7) of this section and subsequently applies and is approved for a renewable loan, the one-year loan period of the expedited loan counts as the first year of the five-year allowance for the subsequent renewable loan.

**(C)** In each year that a renewable loan is exercised, the applicant shall provide the written notice described in subsection (2)(b)(II) of this section.

**(V)** A party may file comments concerning potential injury to the party's water rights or decreed conditional water rights due to the operations of the loan of the water right with the state engineer by January 1 of the year following each year that the loan is exercised. The procedures of subsection (2)(b) of this section regarding notice, opportunity to comment, the state engineer's decision, and an appeal of the decision shall again be followed with regard to the party's comments. In an appeal to the water judge in the applicable water division of the determination made by the state engineer pursuant to this section, the applicant has the burden of proof that the loaned water right does not cause injury to other vested or conditionally decreed water rights. Any appeal of a decision by the state engineer concerning the loan pursuant to this section shall be made in accordance with the procedures set forth in subsection (2)(b) (VIII) of this section.

**(VI)** Rules promulgated by the Colorado water conservation board pursuant to subsection (3) of this section.

**(b)** In determining whether injury will occur, the state engineer shall ensure that the following conditions are met:

**(I)** The applicant has filed a request for approval of the loan with the state engineer, together with a filing fee in the amount of three hundred dollars. The state engineer shall transmit the fee to the state

treasurer, who shall deposit the fee in the water resources cash fund created in section 37-80-111.7 (1).

The request for approval must include:

- (A)** Evidence of the proponent's legal right to use the loaned water right;
  - (B)** A statement of the duration of the proposed loan;
  - (C)** A description of the original points of diversion, the return flow pattern, the stream reach, and the time, place, and types of use of the loaned water right;
  - (D)** A description of the new proposed points of diversion, the return flow pattern, the stream reach, and the time, place, and types of use of the loaned water right; and
  - (E)** A reasonable estimate of the historic consumptive use of the loaned water right;
- (II)** The applicant has submitted proof to the state engineer, in a form and manner determined by the state engineer, demonstrating that the applicant provided written notice of the request for approval of the loan by first-class mail or electronic mail to:
- (A)** 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
  - (B)** 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.
- (II.5)** The applicant has proven that the loan will not injure decreed water rights, decreed exchanges of water, or other water users' undecreed existing exchanges of water to the extent that the undecreed existing exchanges have been administratively approved before the date of the filing of the request for approval of the loan.
- (III)** The proposed use of the loaned water right is for agricultural irrigation purposes or for instream flow purposes by the Colorado water conservation board;
- (IV)** None of the water rights involved in the loan are adjudicated to or diverted at a well located more than one hundred feet from the bank of the nearest flowing stream;
- (V)** The state engineer has given the owners of water rights and decreed conditional water rights the opportunity to file comments on the proposed loan within the relevant time frame indicated in this subsection (2)(b)(V). The comments must include any claim of injury or any terms and conditions that should be imposed upon the proposed loan to prevent injury to a party's water rights and any other information the commenting party wishes the state engineer to consider in reviewing the proposed loan. The state engineer shall provide the parties entitled to notice under subsection (2)(b)(II) of this section:
- (A)** Fifteen days after the date of mailing of notice for expedited loans authorized under subsection (2)(a)(III.7) of this section to provide comments on the proposed loan; and
  - (B)** Sixty days after the date of mailing of notice for renewable loans authorized under subsection (2)(a)(IV) of this section to provide comments on the proposed loan.
- (VI)** The state engineer, after consideration of any comments received, has determined that the operation and administration of the proposed loan will not cause injury to other decreed water rights, decreed exchanges, or undecreed exchanges as described in subsection (2)(b)(II.5) of this section and, for loans made pursuant to subsection (2)(a) of this section, will not affect Colorado's compact

entitlements. The state engineer shall impose such terms and conditions as are necessary to ensure that

these standards are met. In making the determinations specified in this subsection (2)(b)(VI), the state

engineer need not hold any formal hearings or conduct any other formal proceedings, but may conduct a hearing or formal proceeding if the state engineer finds it necessary to address the issues.

**(VII)** The state engineer shall approve or deny the proposed loan within ten days after the period for comments on the proposed loan specified in subsection (2)(b)(V) of this section has expired.

**(VIII)** When the state engineer approves or denies a proposed loan, the state engineer shall serve a copy of the decision on all parties to the application by first-class mail or, if the parties have so elected, by electronic mail. Neither the approval nor the denial by the state engineer creates any presumptions or serves as a defense in any legal action that may be initiated concerning the loan. A party may file an appeal of a decision by the state engineer concerning the loan pursuant to this section to the water judge in the applicable water division within fifteen days after the date that the state engineer, following the state engineer's consideration of any comments submitted pursuant to subsection (2)(a)(V) of this section, serves the decision on the parties to the application. The applicant has the burden of proof to demonstrate that the loaned water right does not cause injury to other vested or conditionally decreed water rights, decreed exchanges, or undecreed exchanges as described in subsection (2)(b)(II.5) of this section. The water judge shall hear and determine the appeal on an expedited basis using the procedures and standards set forth in section 37-92-304 (3) concerning matters rereferred to the water judge by the water referee.

**(c)** All periods of time during which a loaned water right is used by the board for instream flow purposes shall be excluded from any historic consumptive use analysis of the loaned water right required under any water court proceeding.

**(3)** The Colorado water conservation board shall promulgate rules regarding the following necessary steps for its review and acceptance of loans for instream flow use pursuant to subsection (1)(b)(II) of this section:

**(a)** The board's review of the proposed loan, including a requirement that the board request and review a biological analysis from the division of parks and wildlife concerning the extent to which the proposed loan will improve the natural environment to a reasonable degree;

**(b)** A requirement that when considering a proposed loan, the board shall give preference to loans of stored water, when available, over loans of direct flow water; and

**(c)** The board's determination, after a hearing on the matter, if requested, whether to accept the proposed loan.

## History

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**Source:** L. 1899: p. 236, § 3. R.S. 08: § 3232. C.L. § 1712. CSA: C. 90, § 110. CRS 53: § 147-6-5.

**C.R.S. 1963:** § 148-6-5. **1993:** Entire section amended. **2006:** § 1, effective June 5. **2004:** (1)



**C.R.S. 1903.** § 140-0-0. **L. 2003.** Entire section amended, p. 2390, § 1, effective June 3. **L. 2004.** (1),

IP(2)(b), (2)(b)(III), (2)(b)(VI), and (2)(b)(VII) amended, p. 1014, § 1, effective May 21. **L. 2005:**

IP(2)(a) amended and (2)(a)(IV) and (2)(a)(V) added, p. 82, § 1, effective August 8. **L. 2007:** (2)(c)

added, p. 48, § 1, effective August 3. **L. 2012:** IP(2)(b)(I) amended, (SB 12-009), ch. 197, p. 792, § 6,

effective July 1. **L. 2020:** (1), IP(2)(a), (2)(a)(IV), (2)(a)(V), IP(2)(b), IP(2)(b)(I), (2)(b)(II), (2)(b)(V),

(2)(b)(VI), (2)(b)(VII), and (2)(b)(VIII) amended and (2)(a)(III.5), (2)(a)(III.7), (2)(a)(VI), (2)(b)

(II.5), and (3) added, (HB 20-1157), ch. 52, p. 179, § 1, effective September 14.

## ▼ Annotations

### Notes

**Editor's note:** Section 2 of chapter 52 (HB 20-1157), Session Laws of Colorado 2020, provides that the act changing this section applies to conduct occurring on or after September 14, 2020.

### Case Notes

#### ANNOTATION

**Law reviews.** For article, "The Effect of Water Law on the Development of Oil Shale", see 58 Den. L.J. 751. For article, "Water Banking: A New Tool For Water Management", see 23 Colo. Law. 595 (1994). For article, "Private Means to Enhance Public Streams", see 33 Colo. Law. 69 (April 2004).

**The parties who are concerned in the exchange, the lender and the borrower, must each and all be the owners** of rights to the use of water for irrigation. Ft. Lyon Canal Co. v. Chew, 33 Colo. 392, 81 P. 37 (1905).

**If this section had purported to create rights which did not theretofore exist, or if it was to be interpreted** as permitting exchanges or loans of water without reference to the rights of other appropriators, it could not be upheld as a valid legislative enactment. Ft. Lyon Canal Co. v. Chew, 33 Colo. 392, 81 P. 37 (1905).

**This section does not apply to a rotational no-call agreement because such an agreement does not loan a water right;** rather, each party to the agreement diverts pursuant to its own decreed priority with the senior water right holders simply forbearing from asserting their priority. LoPresti v. Brandenburg, 267 P.3d 1211 (Colo. 2011).

**The provisions of this section only permit an exchange or loan of water** under conditions which do not injuriously affect the vested rights of other appropriators. Bowman v. Virdin, 40 Colo. 247, 90 P. 506 (1907).

**Under this section a complaint is fatally defective in an action to restrain defendants from interfering with plaintiff** using water loaned to him by other appropriators, which fails to allege that the water so loaned can and will be used by plaintiff without impairing the vested rights of defendants owning later priorities. Bowman v. Virdin, 40 Colo. 247, 90 P. 506 (1907).

**This section seems to recognize a temporary exchange or loan of water without first obtaining a decree.** Ft. Lyon Canal Co. v. Chew, 33 Colo. 392, 81 P. 37 (1905).

**Such right is subject to the qualification of impairing vested rights.** Ft. Lyon Canal Co. v. Chew, 33 Colo. 392, 81 P. 37 (1905).

COLORADO REVISED STATUTES

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## **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.]*

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#### **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 water right for the same lake or reach of stream and exercises the rights independently 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 31st, 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 10th, 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 30th, 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 15th, 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 31st, 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 30th, 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 31st, at each regularly scheduled Board meeting, time will be allocated for public comment. Subsequent to March 31st, 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 31st, 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 10th, 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 30th, 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 30th 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 30th. 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 30th or the first business day thereafter, for good cause shown.
- (2) The request for Contested Hearing Participant status must be received by April 30th, 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 31st. 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 15th, 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 15th, 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 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 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 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 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.

#### **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 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 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 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.

## **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.**

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 Person 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 Person 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 Person 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 Person 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 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 regardless of the individual depletive effect of 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 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:

- (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 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, and 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 of lake to a reasonable degree despite the injury;
  - 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 address the 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 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 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.
  - (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 of NLL water right(s); and
      - 3. Potential impact to the natural environment of the affected stream reach(es) or lake from 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:
  - 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;
  - vi. Administrability of proposed alternatives by the Board and the Division Engineer; 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.

#### **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 6m., 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.

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### **Editor's Notes**

### **History**

Entire rule eff. 03/02/2009.

**Annotations**

See Aspen Wilderness Workshop v. Colorado Water Conservation Bd., 901 P.2d 1251 (1995).

# Colorado Register



**43 CR 20**

**Volume 43 , No. 20**

**October 25, 2020**

# Introduction

The *Colorado Register* is published pursuant to C.R.S. 24-4-103(11) and is the sole official publication for state agency notices of rule-making, proposed rules, attorney general's opinions relating to such rules, and adopted rules. The register may also include other public notices including annual departmental regulatory agendas submitted by principal departments to the secretary of state.

"Rule" means the whole or any part of every agency statement of general applicability and future effect implementing, interpreting, or declaring law or policy or setting forth the procedure or practice requirements of any agency. "Rule" includes "regulation". C.R.S. 24-4-102(15). Adopted rules are effective twenty days after the publication date of this issue unless otherwise specified.

The *Colorado Register* is published by the office of the Colorado Secretary of State twice monthly on the tenth and the twenty-fifth. Notices of rule-making and adopted rules that are filed from the first through the fifteenth are published on the twenty-fifth of the same month, and those that are filed from the sixteenth through the last day of the month are published on the tenth of the following month. All filings are submitted through the secretary of state's electronic filing system.

For questions regarding the content and application of a particular rule, please contact the state agency responsible for promulgating the rule. For questions about this publication, please contact the Administrative Rules Program at [rules@sos.state.co.us](mailto:rules@sos.state.co.us).



# Notice of Proposed Rulemaking

**Tracking number**

2020-00812

**Department**

400 - Department of Natural Resources

**Agency**

408 - Colorado Water Conservation Board

**CCR number**

2 CCR 408-2

**Rule title**

RULES CONCERNING THE COLORADO INSTREAM FLOW AND NATURAL LAKE  
LEVEL PROGRAM

**Rulemaking Hearing****Date**

01/26/2021

**Time**

09:00 AM

**Location**

Via video conference, see <https://cwcb.colorado.gov>

**Subjects and issues involved**

The proposed revisions to the Rules will update: (1) the reference to the Boards website in Rule 4c.; and (2) references to Colorado Parks and Wildlife throughout the Rules. The revisions also amend Rules 6k. and 6m. to implement House Bill 20-1157, which addresses temporary loans of water for instream flow use.

**Statutory authority**

Sections 37-60-108, 37-83-105(3), and 37-92-102(3), C.R.S. (2020)

**Contact information****Name**

Linda Bassi

**Title**

Chief, Stream and Lake Protection Section, CWCB

**Telephone**

(303) 866-3441 X3204

**Email**

[linda.bassi@state.co.us](mailto:linda.bassi@state.co.us)

## 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 prepare and submit 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 provide 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~~ 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.**

...

**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.**

...

**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:

...

- (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 CPW~~DOW~~) 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.

...

- (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 CPW~~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.

...

- (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:

...

- iii. A provision allowing CWCB or CPW~~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);

#### **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.

## **NOTICE OF PUBLIC RULEMAKING HEARING BEFORE THE COLORADO WATER CONSERVATION BOARD**

### **I. NATURE OF PUBLIC RULEMAKING HEARING**

Pursuant to section 24-4-103, C.R.S., this is a notice of a public rulemaking hearing before the Colorado Water Conservation Board (“Board”) for consideration of amendments to the Board’s Rules Concerning the Colorado Instream Flow and Natural Lake Level Program, 2 CCR 408-2 (“Rules”). The amendments primarily affect Rule 6k. (Temporary Loans of Water to the Board) and Rule 6m. (Public Input on Proposed Acquisitions).

The Board is amending the Rules to: (1) address the requirements of House Bill 20-1157; (2) update a reference to the Board’s website; and (3) update references to Colorado Parks and Wildlife (“CPW”).

### **II. DESCRIPTION OF THE SUBJECTS AND ISSUES INVOLVED**

HB 20-1157 amends section 37-83-105, C.R.S. (2019), which governs temporary loans of water for instream flow (“ISF”) use. Among other things, HB 20-1157 directs the Board to promulgate rules to implement certain provisions of the bill.

Board Staff (“Staff”) drafted proposed changes to the Rules, solicited written comments from interested parties, and held public (a.k.a. stakeholder) meetings on August 3 and August 18, 2020, to allow interested parties to provide input on the proposed changes. At its September 16, 2020 meeting, the Board appointed a hearing officer and authorized Staff and the Hearing Officer to proceed with the formal rulemaking process. The formal rulemaking process is initiated by filing a notice of rulemaking hearing with the Secretary of State and publication in the Colorado Register.

Staff will retain a record of the rulemaking pursuant to section 24-4-103(8.1), C.R.S. The initial proposed rule amendments submitted to the Secretary of State are available on the Board’s website.

The proposed revisions to the Rules update: (1) the reference to the Board’s website in Rule 4c.; and (2) references to CPW throughout the Rules. The revisions also amend Rules 6k. and 6m. to implement HB 20-1157, and include:

- A. Definitions of expedited and renewable loans. The proposed amendments describe the two different types of loans, the requirements for each type of loan application, notice requirements and allowed ISF uses of loaned water for each type of loan, and the Board Director’s delegated authority for each type of loan;
- B. Procedures for evaluating and requesting approval of expedited loans, and for Board review and potential ratification of the Board Director’s decision on such loans;
- C. For renewable loans, the Board process for reviewing, receiving public input on, and directing Staff on whether to move forward with a proposed renewable loan, including a hearing under Rule 6m.(5), if requested. The proposed amendments to

- the Rules also describe the steps the Board must take for renewable loans that would improve the natural environment to a reasonable degree, including requesting and reviewing a biological analysis from CPW on the extent to which the proposed loan will improve the natural environment to a reasonable degree, and giving preference for loans of stored water, when available, over loans of direct flow water;
- D. Board consideration of potential injury to decreed water rights, decreed exchanges of water, or 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;
  - E. Staff process for coordinating with a water rights owner on requesting approval from the State Engineer of a proposed renewable loan (after Board review and decision);
  - F. Process for Board review and approval of renewing a loan for a second or third ten-year period; and
  - G. Notice requirements for hearings on renewable loans.

The language of the proposed amendments to the Rules, and a proposed statement of basis and purpose and specific statutory authority for the amendments, are available on the Board's website at <https://cwcb.colorado.gov/instream-flow-rules-revisions-hb-20-1157>, and are available upon request of Staff. Please contact Linda Bassi at (303) 866-3441, extension 3204 or at [linda.bassi@state.co.us](mailto:linda.bassi@state.co.us) for further information.

### III. SPECIFIC STATUTORY AUTHORITY

The statutory authority for promulgating the Rules and any amendments thereto is found at section 37-60-108, C.R.S. The Board's authority for the Colorado Instream Flow and Natural Lake Level Program is found at section 37-92-102(3), C.R.S.

HB 20-1157 revised section 37-83-105, C.R.S., pertaining to temporary loans of water to the Board for ISF use, and directed the Board to promulgate rules to implement certain provisions of the bill.

### IV. PARTY STATUS

The Notice of Rulemaking Hearing will be published in the Colorado Register on October 25, 2020. Applications for party status will be accepted through November 13, 2020. Applications for party status should be submitted to the Board's Hearing Officer, Amy Beatie, by email to [amy.beatie@coag.gov](mailto:amy.beatie@coag.gov). Applications for party status shall include: (1) the name of the person, persons or entity seeking party status; (2) a contact person, if different from IV.(1); (3) the appropriate mailing address, phone number, and email address for the contact person listed in IV.(2); (4) the interest of the person(s) or entity in the proposed amendments to the Rules; and (5) a description of the general nature of the evidence or information to be presented in the course of the proceedings. Staff is automatically a party to the rulemaking proceeding and need not file an application for party status.

## V. PRE-HEARING CONFERENCE

Prior to the rulemaking hearing, the Hearing Officer will hold a pre-hearing conference. After November 13, 2020, when all party status applications have been received, the Hearing Officer will issue an order notifying all parties of the date, time, and location or call-in information for the first pre-hearing conference. The order will also provide any other deadlines and procedures that are appropriate at the time. Participation in the pre-hearing conference may be available by telephone or video conference at the Hearing Officer's discretion; participation will likely only be available by remote participation.

Each applicant for party status must submit a pre-hearing statement in order to participate in the pre-hearing conference.

## VI. RULEMAKING HEARING

### Date, Time, and Location

DATE: January 26, 2021

TIME: 9:00 a.m. (or as otherwise directed by the Hearing Officer)

LOCATION: Via telephone or video conference. Participation information will be provided at a later date: (1) on the Board's website at <https://cwcb.colorado.gov/> and (2) by order of the Hearing Officer to the people or entities who have applied for party status.

### Procedures

The role of the Board's Hearing Officer is to provide orderly procedures for the rulemaking; ruling on substantive issues is a Board responsibility. The Hearing Officer will issue orders designed to streamline and clarify processes consistent with this Notice of Proposed Rulemaking and as permitted by law.

The Board may ask questions of any person appearing before it.

The Board will consider alternative proposals related to the proposed amendments, subject to the procedures established by the Hearing Officer.

The Board may modify the proposed amendments to the Rules from those published in the Colorado Register.

After the conclusion of the rulemaking hearing and after consideration of the relevant matters presented, the Board, through its Hearing Officer, will render its decision to the parties to the hearing.

### Hearing Participation

At the hearing, parties shall be afforded the opportunity to submit written data, views, or arguments, and to present the same orally, unless the Board deems it unnecessary. The submittal of such material and summations, either in writing or orally, shall be as directed by the Hearing

Officer or the Board.

If alternative amendments to the proposed amendments to the Rules are requested by a party, the Board encourages those amendments to be included in the written materials, along with a proposed statement of basis and purpose of the alternative amendments.

Once any written material is submitted, the material becomes part of the administrative rulemaking record and the property of the Board and will not be returned to the person(s) or entity submitting the material.

The Hearing Officer will decide the timing and order of oral presentations by the parties, if any. Any person who is not a party to the hearing but wishes to provide comment may do so in writing prior to the date of the hearing. The Board strongly encourages all interested persons to submit comments in writing; however, a short period of time at the rulemaking hearing (a total of 30 minutes or less) will be reserved for oral comments by interested persons who do not have party status.

#### VII. ADOPTION OF THE RULES

The Board will consider all information presented at the hearing.

The Board may modify the proposed amendments to the Rules in adopting amendments to the Rules.

The final amended Rules, as adopted by the Board, shall become effective no sooner than twenty (20) days after publication in the Colorado Register.

#### VIII. ADMINISTRATIVE RULEMAKING RECORD

The administrative rulemaking record, including the proposed rule amendments, submitted applications for party status, pre-hearing statements, and all other written materials to be considered by the Board in this rulemaking, will be available following the conclusion of these proceedings and upon request to [kimberly.ricotta@state.co.us](mailto:kimberly.ricotta@state.co.us), and at the Board's office at 1313 Sherman Street, Room 718, Denver, CO 80203, during normal business hours (8:00 a.m.-5:00 p.m.), once state agencies are again open to the public.

DATED this 14th day of October, 2020.



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Rebecca Mitchell  
Director  
Colorado Water Conservation Board  
1313 Sherman Street, Rm. 718  
Denver, CO 80203

## 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 prepare 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 provide 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
  - 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~~ 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.**

...

**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.**

...

**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:



...

- (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 CPW~~DOW~~) 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.

...

- (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 CPW~~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.

...

- (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:

...

- iii. A provision allowing CWCB or CPW~~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);

#### **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.

## **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" or "CWCB"). The Rules Concerning the Colorado Instream Flow and Natural Lake Level Program, 2 CCR 408-2 ("Rules"), initially adopted in 1993, codify and establish procedures for the Board to implement the ISF Program.

In 2020, the Board amended the Rules to: (1) address the requirements of House Bill 20-1157 (codified at section 37-83-105, C.R.S.); (2) update a reference to the CWCB's website; and (3) update references to Colorado Parks and Wildlife ("CPW"). The statutory authority for the Rules and the 2020 revisions to the Rules is found at sections 37-60-108, 37-83-105(3), and 37-92-102(3), C.R.S. (2020).

For the 2020 revisions, the Board revised Rule 4c. to update the CWCB website address, and amended Rules 6f.(2); 7d.; 8i.(3)(f), (h), and (l)(iii); and 11c. to update references to Colorado Parks and Wildlife ("CPW"). The Board also revised Rules 6k. and 6m. to address requirements of House Bill 20-1157 regarding temporary expedited and renewable loans of water to the Board for instream flow ("ISF") use.

Specifically, Rule 6k. defines temporary (expedited and renewable) loans; describes allowable uses for each type of loan and time periods for which they may be exercised; and refers to the owner of a decreed water right who has offered water to the Board for an expedited or renewable loan as an "applicant." The language of Rule 6k.(1) previously pertained to all temporary loans of water but now is split into Rule 6k.(1) and 6k.(2) to address expedited and temporary loans separately. Rule 6k.(1) now addresses expedited loans, describing: (a) limitations on the use of such loans; (b) the timing of the CWCB Director's response to an offer of an expedited loan of water for temporary ISF use, and though applicant is ultimately responsible for submitting documentation and requesting approval, the actions staff will take in coordination with an applicant to request approval from the State Engineer of an expedited loan, including preparing and submitting documentation and providing written notice as required by the statute; and (c) the Board's delegation of authority to the CWCB Director, provided that the State Engineer has determined that no injury will result from the expedited loan, to: (i) accept and execute an agreement for the expedited loan of water; and (ii) take any administrative action necessary to put the loaned water to instream flow use. Rule 6k.(1)(d) revisions confirm that the CWCB's use of water under an expedited loan is subject to the CWCB's decreed instream flow rate(s), time period(s) and reach(es) and any conditions imposed by the State Engineer to prevent injury. Rule 6k.(1)(e) describes the timing of the Board's review and action on the CWCB Director's decision regarding an offer of an expedited loan, and now clarifies that if applicant agrees the loan offer should be rejected, that decision does not have to be brought to the Board. Rule 6k.(1)(f) directs the Board, Director, and staff to expedite all actions necessary to implement expedited loans under Rule 6k.(1).

Rule 6k.(2) is a completely new provision that addresses renewable loans of water for temporary instream flow use. Rule 6k.(2)(a) identifies timing limitations on the exercise of renewable loans and provides that 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. Rules 6k.(2)(b) and (c) identify the Board process for reviewing, considering public comment, and directing Staff whether to move forward with a proposed renewable loan, and provide direction on how a person can request a hearing on a proposed renewable loan. Rule 6k.(2)(d) sets forth actions the Board will take when considering a proposed renewable loan to improve the natural environment to a reasonable

degree. Rule 6k.(2)(e) describes the types of water rights and water activities the Board must consider any potential injury to when evaluating a proposed renewable loan. Rules 6k.(2)(f) and (g) describe the actions the Board authorizes and directs Staff to take when the Board directs Staff to move forward with a proposed renewable loan, including coordinating with the applicant in preparing and submitting documentation and providing written notice as required by statute, though the applicant is ultimately responsible for these acts, and provided that the State Engineer determines no injury will result from the proposed loan, executing an agreement for the loan and taking any administrative action necessary to put the loaned water to instream flow use. Rule 6k.(2)(h) provides that in each year that a renewable loan is exercised, the applicant, coordinating with Staff if necessary, shall provide the written notice required by statute. Rule 6k.(2)(i) sets forth the Board's process for reviewing, considering public comment, and deciding whether to authorize Staff to coordinate with an applicant on applying for a renewal of an existing renewable loan for an additional ten-year period, including preparing and submitting documentation and providing written notice as required by statute.

Rule 6k.(3) is taken directly from HB20-1157 and provides that 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.

In 2020, the Board also amended Rule 6m. to exclude expedited and temporary loans from the process in Rules 11a-11c, and to address the hearing process for renewable loans, which differs from the hearing process for other acquisitions of water for instream flow use only regarding to whom and when notice of a hearing will be provided. Rule 6m.(5)(d) has been added and provides that at least thirty days prior to the hearing date, the Board shall provide written notice of a hearing on a proposed renewable loan, including the process and deadlines for participating in the hearing, to the applicant and to the recipients specified in section 37-83-105(2)(b)(II), C.R.S.

BEFORE THE COLORADO WATER  
CONSERVATION BOARD

1313 Sherman St, #718  
Denver, CO 80203

Amy Beatie, Hearing Officer  
[amy.beatie@coag.gov](mailto:amy.beatie@coag.gov)

**IN THE MATTER OF THE RULEMAKING  
CONCERNING THE COLORADO INSTREAM  
FLOW AND NATURAL LAKE LEVEL PROGRAM  
2 CCR 408-2 AND HOUSE BILL 20-1157**

*Attorneys for the City of Aurora, acting by and through  
its Utility Enterprise,*  
**HAMRE, RODRIGUEZ, OSTRANDER & DINGESS, P.C.**

Address: John M. Dingess, #12239  
3600 S. Yosemite Street, Suite 500  
Denver, Colorado 80237-1829  
Phone: (303) 779-0200  
FAX: (303) 779-3662  
E-mail: [mail@hrodllaw.com](mailto:mail@hrodllaw.com)  
[jdingess@hrodllaw.com](mailto:jdingess@hrodllaw.com)

**PREHEARING STATEMENT OF THE CITY OF AURORA**

Pursuant to the Order Regarding Procedures and Deadlines for Prehearing Submissions issued by the Colorado Water Conservation Board (“CWCB” or “Board”) on November 20, 2020, the City of Aurora, Colorado, acting by and through its Utility Enterprise, hereby submits its pre-hearing statement.

In this matter, the CWCB seeks to amend the Rules Concerning the Colorado Instream Flow and Natural Lake Level Program, 2 CCR 408-2 (“Rules”), which codify and establish the

procedures by which the CWCB implements the instream flow program. The amendments sought by the CWCB are with regard to the changes made to C.R.S. § 37-83-105 under House Bill 20-1157.

**A. Position Statement.**

Aurora Water is Colorado's third largest municipal water utility, providing drinking water, sewer conveyance and storm drain services to over 388,000 customers. On an annual basis, Aurora provides up to 52,000 acre-feet of high quality water for residential, multifamily commercial, and irrigation purposes to over 89,000 accounts. Aurora gets its water from three different river basins, with 25% coming from the Colorado River, 25% from the Arkansas River, with the remaining 50% originating in the South Platte River basin. Aurora Water is able to reuse 95% of its water and was the first municipality in the state to incorporate potable reuse.

Aurora understands the CWCB's intent herein is to propose revisions to the Rules for the narrow purpose of addressing the rulemaking requirement of HB 20-1157. However, HB 20-1157 requires the CWCB to promulgate rules regarding the necessary steps for its review and acceptance of loans for instream flow use pursuant to subsection (1)(b)(II) of C.R.S. § 37-83-105. C.R.S. § 37-83-105(1)(b)(II) provides that the owner of any decreed water right may loan water to the CWCB for use as instream flows to improve the natural environment to a reasonable degree for a stream reach for which the CWCB holds an instream flow right. Pursuant to C.R.S. § 37-83-105 renewable loans may be used to either preserve or improve the natural environment to a reasonable degree, whereas expedited loans of water may only be used to preserve the natural environment to a reasonable degree. Accordingly, the promulgation of rules by the CWCB required by HB 20-1157 is limited to renewable loans of water. If the CWCB's purpose is to revise the Rules for

expedited as well as renewable water loans, Aurora's proposed revisions to sections 6e, 6f, 6h, and 6i of the Rules should be given due consideration.

Aurora's suggested amendments are necessary to clarify the Rules and to bring the entirety of the Rules into compliance with the language and intent of HB 20-1157. This is necessary in order to prevent injury to Aurora's vast water rights system. It is especially important that the Rules be abundantly clear that all water loaned to the CWCB for instream flow purposes is to be operated under the priority of the instream flow right, not under the priority of the loaned water.

All water rights users including Aurora are held to strict administration consistent with their respective priorities of their water rights. Such assures lawful distribution of the critical resource. So too the CWCB is required to operate pursuant to priority administration. Therefore, it must be clear CWCB in-stream flows are operated pursuant to the priorities of the in-stream flow right itself, and any existing water rights acquired to improve or preserve stream reaches are not improperly afforded a senior in-stream flow priority. Not making this clear will engender argument to the contrary. A position that in effect the use of an existing water right for stream flow purposes is "changed" to in-stream flow use with retention of its senior priority will deprive other water uses of the protections afforded by Water Court change of water rights procedures or administrative safeguards under substitute water supply plan statutes. Stripping away these provisions would leave Aurora and other water users defenseless to protect their operations.

Not only is proper administration important to water supply rights it is also critical to operational water rights such as exchanges. An instream flow right in a stream reach can drastically decrease exchange potential for operations junior to the in-stream flow right. Accordingly, instream flow rights must continue to subordinate senior exchange rights and not be

granted a mechanism to leap over senior exchanges by virtue of supplying flow with an existing earlier water right. Again, Aurora and other water users must retain a clear ability to operate valuable senior exchange rights and not have their defenses clouded by unclear administrative rules engendering contrary argument.

In order to protect its interests, Aurora provides the following comments regarding, and amendments to, the amended Rules published with the Notice of Proposed Rulemaking issued by the CWCB on October 25, 2020. See **Exhibit A**, attached hereto.

1. Aurora expects to present testimony regarding its requested revision to 2 CCR 408-2 6h. The proposed Rules should provide at 2 CCR 408-2 6h that if the seller, lessor, lender or donor of the water desires to bring about beneficial use of the historical consumptive use of the acquired water right downstream of the ISF reach as fully consumable reusable water, the seller may do so only in priority pursuant to the water court decree authorizing the Board to use the acquired water. A loaned water right must be operated under the instream flow priority when used by the CWCB for temporary instream flow purposes. If the water rights are not operated in priority, injury to existing water rights will occur. HB 20-1157 specifically directs injury to existing water rights may not occur when the CWCB uses a loaned water right for instream flow purposes. See C.R.S. § 37-82-105(2)(a)(III), (2)(a)(V), (2)(b)(II.5), (2)(b)(VI) and (2)(b)(VIII).
2. While Aurora does not intend to present specific testimony regarding the following suggested revisions, Aurora believes the revisions are necessary to clarify the entirety of the Rules and to bring them into compliance with HB 20-1157:

- i. In determining the appropriateness of any acquisition of existing water rights or interests in water rights under 2 CCR 408-2 6e., the proposed Rules should include the requirement that the Board evaluate the then presently decreed use parameters, including but not limited to time of use, amount of use and types of use. HB 20-1157 requires the state engineer to evaluate the water rights use parameters, including time of use, amount of use and types of use when determining whether the water right is appropriate for use by the CWCB. See C.R.S. § 37-82-105(2)(a)(I) which requires the CWCB to compile a statement about the duration of the loan, a description of the original points of diversion, and other relevant information sufficient for the state engineer to determine that such loan does not injure existing decreed water rights. See also C.R.S. § 37-83-105(2)(b)(I) which requires the applicant to provide certain information regarding the subject water right, including a description of the original points of diversion, the return flow pattern, the stream reach, and the time, place, and types of use of the loaned water right, as well as a description of the new proposed points of diversion, the return flow pattern, the stream reach, and the time, place, and types of use of the loaned water right.
- ii. The proposed Rules, again as part of 2 CCR 408-2 6e., should state the Board's determination of how best to utilize acquired water rights or interests in water rights be done consistent with the legal requirements applicable to the acquired rights or interests. See C.R.S. § 37-83-105(2)(a)



and (b) which set forth the requirements for determining whether or not the use of a loaned water right will injure existing water rights.

- iii. Regarding 2 CCR 408-2 6f. (4), the proposed Rules should provide that any determination by the Division Engineer of administrability should be reviewable by the applicable Water Court. Review by the Water Court is mandated by HB 20-1157. See C.R.S. § 37-83-105(2)(b)(VIII).
- iv. Regarding 2 CCR 408-2 6i., to be consistent with law, subparts (1) & (2) of the proposed Rules should reflect the Water Court determines, rather than verifies, quantification of historical consumptive use and return flows. See C.R.S. § 37-83-105(2)(b)(VIII) which states the Water Court “shall hear and determine” any appeal.
- v. Regarding 2 CCR 408-2 6i. subpart (3), to be consistent with law, the proposed Rules should reflect the Board may seek amendment of the subject change decree, if required by law or the Division Engineer. The Board does not have the authority to amend a change decree but may seek to amend a decree through approval of the Water Court. See C.R.S. § 37-92-102(3) which provides the Board shall file a change of water right or other application with the Water Court.
- vi. Regarding 2 CCR 408-2 6i., to be consistent with law, the proposed Rules should include a new subpart (4) requesting of the Water Court such other terms and conditions as necessary and proper to prevent injury. See C.R.S. § 37-92-305.

3. Aurora acknowledges the CWCB has the authority to promulgate the rules necessary to operate its decreed instream flow rights. In promulgating such rules and operating its water rights, the CWCB should be mindful to not use its governmental authority to expand its rights or to degrade the rights of others. Colo. Dep't of Revenue v. Garner, 66 P.2d 106, 109 (Colo. 2003) (courts have a duty to invalidate a regulation or rule that is contrary to the plain meaning of the statute); Board of County Com'rs of Douglas County, Colo. v. Bainbridge, Inc., 929 P.2d 691 (Colo. 1996). Due to the ever-increasing costs of acquiring and operating municipal water supplies, Aurora requests the CWCB perform its functions, including its rulemaking activities, in a manner that is the least intrusive to other water right holders.

**B. Witness.** Dawn Jewell, South Platte Basin Water Resources Supervisor for the City of Aurora. Ms. Jewell plans to testify regarding Aurora's water system and the potential for injury to Aurora's water rights, including its decreed exchanges, should the water used by the CWCB pursuant to a loan or an acquisition of a decreed right to satisfy its instream flow decrees be used absent a strict administration of the priority system. Ms. Jewell's resume is submitted herewith as **Hearing Exhibit Aurora-1**.

**C. Statement of Open Legal Questions.** A legal question is presented as to whether the Rules fully comply with HB 20-1157. While an administrative agency's interpretation of a statute is given deference, the courts have a duty to invalidate a regulation or rule that is contrary to the plain meaning of the statute. Colo. Dep't of Revenue v. Garner, 66 P.3d 106, 109 (Colo. 2003).

**D. Statement of Relief Requested.** Aurora requests the revised Rules strictly adhere to the statute.

**E. Time Required.** Two hours.

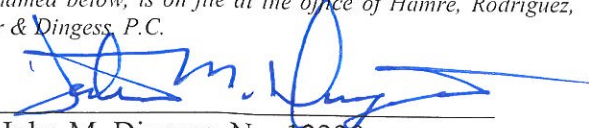
**F. Exhibit List and Exhibits.** Aurora's Exhibit List is attached hereto as **Exhibit B**. As required, Aurora's exhibits were submitted as separate files at the time of submission of this Prehearing Statement.

Respectfully submitted this 10<sup>th</sup> day of December 2020.

HAMRE, RODRIGUEZ, OSTRANDER  
& DINGESS, P.C.

*The physical copy of the original of this document, duly signed by the attorney named below, is on file at the office of Hamre, Rodriguez, Ostrander & Dingess, P.C.*

By:

  
John M. Dingess, No. 12239

## CERTIFICATE OF E-SERVICE

I hereby certify that on this 10<sup>th</sup> day of December 2020, a true and correct copy of the foregoing **PREHEARING STATEMENT OF THE CITY OF AURORA** was electronically transmitted to the following:

<u>Party Name</u>	<u>Attorney</u>	<u>E-Mail</u>
<b>Hearing Officer</b>	Amy Beatie Deputy Attorney General Natural Resources & Environment Section Office of the Colorado Attorney General 1300 Broadway, 7 <sup>th</sup> Floor Denver, CO 80203 720-508-6259  With copy to: John Watson	<a href="mailto:amy.beatie@coag.gov">amy.beatie@coag.gov</a>         <a href="mailto:john.watson@goag.gov">john.watson@goag.gov</a>
Colorado Water Conservation Board Staff	Linda Bassi Colorado Water Conservation Board 1313 Sherman Street, Room 718 Denver, CO 80203 303-866-3441 ext. 3204	<a href="mailto:linda.bassi@state.co.us">linda.bassi@state.co.us</a>
Counsel for Colorado Water Conservation Board Staff	Jen Mele Marc Sarmiento Allison Robinette Natural Resources & Environment Section Office of the Colorado Attorney General 1300 Broadway, 7 <sup>th</sup> Floor Denver, CO 80203 720-508-6259	<a href="mailto:jennifer.mele@coag.gov">jennifer.mele@coag.gov</a> <a href="mailto:marc.sarmiento@coag.gov">marc.sarmiento@coag.gov</a> <a href="mailto:allison.robinette@coag.gov">allison.robinette@coag.gov</a>
The Nature Conservancy	Aaron Citron 2424 Spruce Street Boulder, CO 80302 520-730-3421	<a href="mailto:Aaron.citron@tnc.org">Aaron.citron@tnc.org</a>
The Colorado Water Trust	Kate Ryan 3264 Larimer Street, Suite D Denver, CO 80205 720-570-2897	<a href="mailto:kryan@coloradowatertrust.org">kryan@coloradowatertrust.org</a>

Mesa County, Colorado	Amber Swasey Mesa County Community Development PO Box 20,000-5022 Grand Junction, CO 81502 970-244-1762	<a href="mailto:Amber.swasey@mesacounty.us">Amber.swasey@mesacounty.us</a>
Trout Unlimited	Drew Peternell Trout Unlimited P.O. Box 4165 Eagle, CO 81631 303-204-3057	<a href="mailto:Drew.peternell@tu.org">Drew.peternell@tu.org</a>
Western Resource Advocates, Conservation Colorado, and the National Audubon Society	John Cyran 2260 Baseline Road Boulder, CO 80302 303-746-3802	<a href="mailto:John.cyran@westernresources.org">John.cyran@westernresources.org</a>
Colorado River Water Conservation District	Peter C. Fleming Jason V. Turner Lorra Nichols Colorado River Water Conservation District P.O. Box 1120 Glenwood Springs, CO 81602 970-945-8522	<a href="mailto:pfleming@crwcd.org">pfleming@crwcd.org</a> <a href="mailto:jturner@crwcd.org">jturner@crwcd.org</a> <a href="mailto:lnichols@crwcd.org">lnichols@crwcd.org</a>
Colorado Parks and Wildlife	Katie Birch Rob Harris 6060 Broadway Denver, CO 80216 303-291-7335 303-291-7550  Elizabeth Joyce 1300 Broadway Denver, CO 80203 720-508-6761	<a href="mailto:Katie.birch@state.co.us">Katie.birch@state.co.us</a> <a href="mailto:Robert.harris@state.co.us">Robert.harris@state.co.us</a>  <a href="mailto:Elizabeth.joyce@coag.gov">Elizabeth.joyce@coag.gov</a>

The signed original is on file in the Law Offices of Hamre, Rodriguez,  
Ostrander & Dingess, P.C.




Ashley Jellison / Miranda Schieving

EXHIBIT A  
Prehearing Statement of Aurora  
Aurora's proposed revisions are highlighted

**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 presently decreed use parameters, including but not limited to, time of use, amount of use, and types of use.
- (2) 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;
- (3) The natural flow regime;
- (4) Any potential material injury to existing decreed water rights;
- (5) The historical consumptive use and historical return flows of the water right proposed for acquisition that may be available for instream flow use;
- (6) 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;
- (7) The location of other water rights on the subject stream(s);
- (8) 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;
- (9) The effect of the proposed acquisition on the maximum utilization of the waters of the state;
- (10) Whether the water acquired will be available for subsequent use or reuse downstream;
- (11) The cost to complete the transaction or any other associated costs; and
- (12) The administrability of the acquired water right when used for instream flow purposes.

The Board shall, consistent with legal requirements, 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. Nevertheless, such determinations will be reviewable by the Water Court.
- (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 when operated in priority under the ISF right, 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) **Determine** ~~Verify~~ the quantification of the historical consumptive use of the acquired water right;
- (2) **Determine** ~~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~~ **seek amendment of** the subject change decree, if required by **law or** 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) **Include such other terms and conditions as the Water Court deems necessary and proper.**
- (5) 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~~ 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) under (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' undecreed existing exchanges of water to the extent that the undecreed 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.**

...

**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.**

...

**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:



...

- (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 CPW~~DOW~~) 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.

...

- (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 CPW~~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.

...

- (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:

...

- iii. A provision allowing CWCB or CPW~~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);

#### **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.

EXHIBIT B

**List of Hearing Exhibits**

City of Aurora

In the Matter of the Rulemaking Hearing to Revise Rules Concerning the  
Colorado Instream Flow and Natural Level Program, 2 CCR 408-2

**Exhibit Number**

Aurora-1	Resume of Dawn Jewell
Aurora-2	Map - Aurora Water Supply System
Aurora-3	Map - Aurora Water, Water Supply



**Education**

Bachelor of Science Degree in Land Use, Emphasis in Environment and Resources, Minor in Geography  
Metropolitan State College of Denver

**Professional Experience**

**City of Aurora, Aurora Water Department**

**September 2007 – Present**

**Water Resources Supervisor (May 2017 – Present)**

**Water Resources Engineer (January 2016 – May 2017)**

**Engineer (July 2011 – January 2016)**

**Engineering Assistant (September 2007 – July 2011)**

- Manage the South Platte Water Resources team responsible for the administration, development, and protection of raw water assets for the City of Aurora in the South Platte River basin.
- Responsible for Water Court Division One decree and intergovernmental agreement compliance for the City of Aurora in the South Platte River basin.
- Coordinate the Water Court Division One applications, oppositions, and other activities for the City of Aurora in the South Platte River basin.
- Oversee the raw water operations and accounting activities for the City of Aurora's water rights in the South Platte River basin.

**JPMorgan Retirement Plan Services**

**April 2000 – August 2007**

**Service Delivery Specialist (December 2005 – August 2007)**

**Scheduling and Data Center Representative (April 2001 – July 2002, April 2004 – December 2005)**

**Team Development Specialist (June 2001 – October 2003)**

**Participant Services Specialist (April 2000 – September 2002, October 2003 – December 2005)**

- Supervised defined benefit retirement plan representatives.
- Trained defined benefit and defined contribution retirement plan specialists.
- Created training manuals for defined benefit and contribution plan specialists.
- Conducted the hiring for the JPMorgan Retirement Plan Services Denver call center.
- Performed several positional functions at the same time on a part-time basis as needed

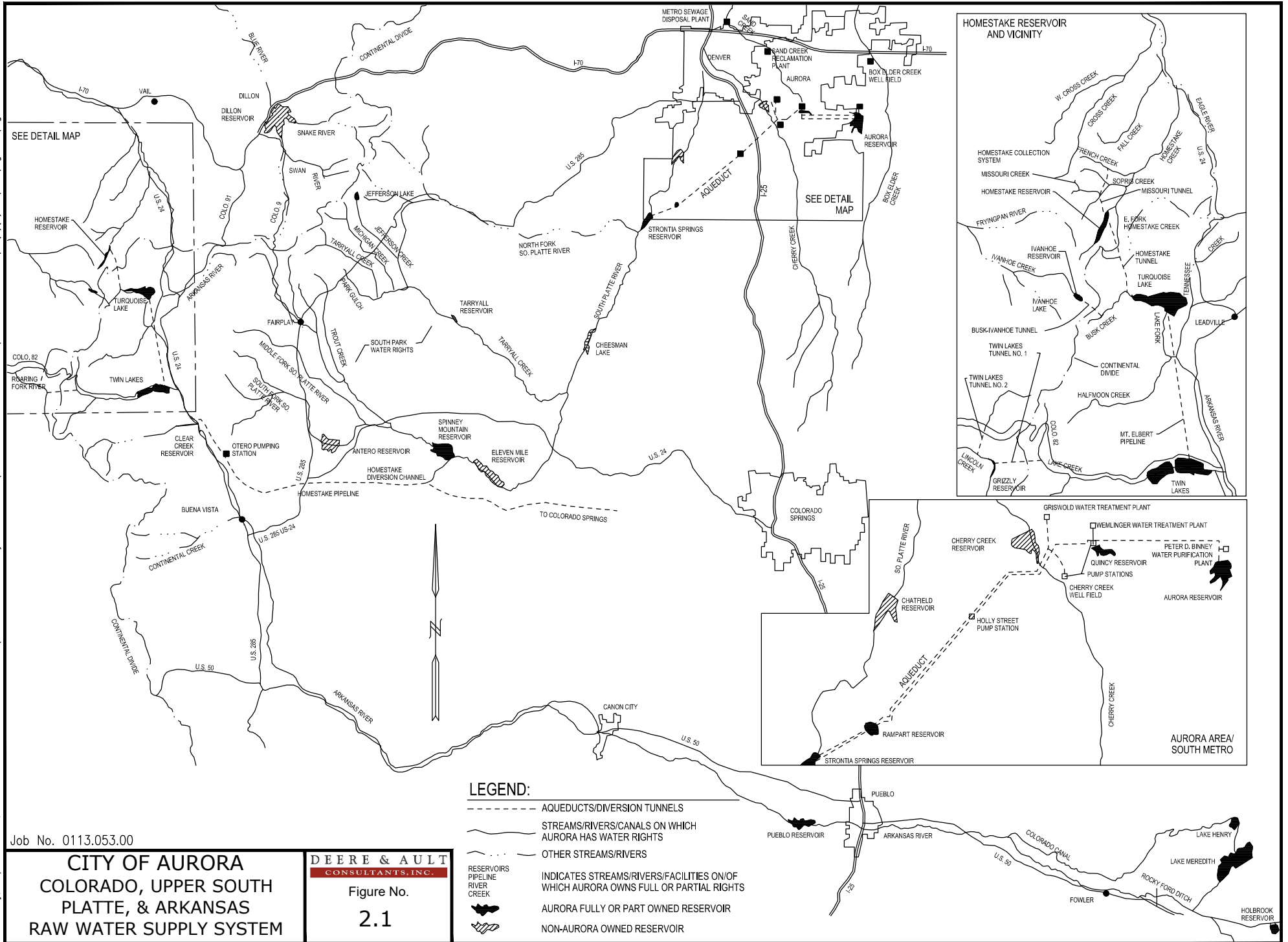
**United States Geological Survey**

**August 1998 – April 2000**

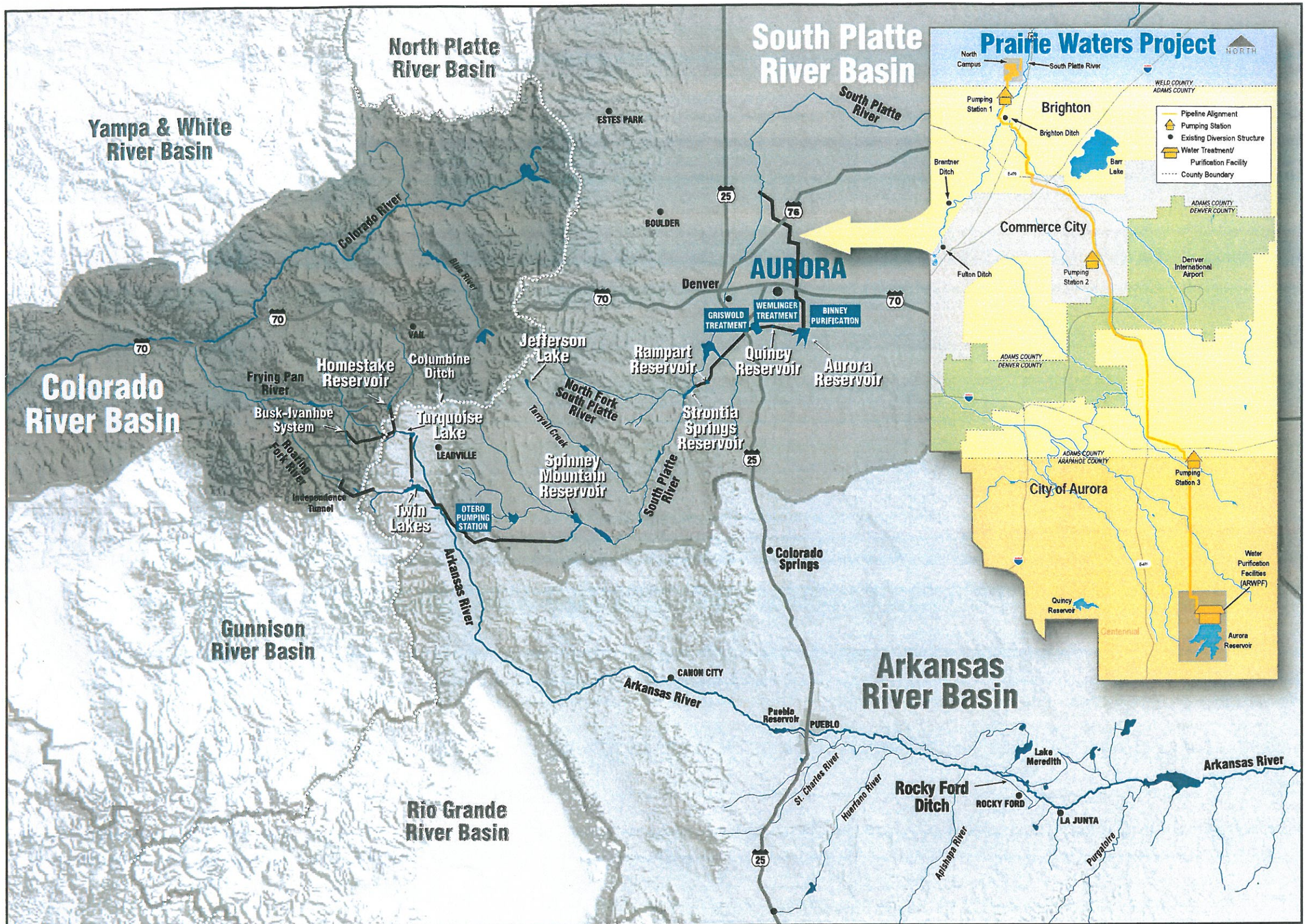
**Hydrologic Technician**

- Utilized Arc/Info (UNIX) and Arcview (PC) to map several large-scale water resource projects (abandoned mine lands and acid precipitation oriented)
- Responsible for watershed mapping, including map retrieval, manual watershed definition, electronic mapping transferal, and final map creation
- Improved and documented isotope isolation process for Sulfur ( $^{34}\text{S}$  and  $^{35}\text{S}$ ) and Nitrogen ( $^{15}\text{N}$ ) isotopes
- Responsible for isotope isolation for all inbound water samples (including preparation, capture, extraction, and collection of isotopes) as noted in USGS Open-File Report 00-394.
- Conducted field sampling of surface and ground water including river, lake, spring, and snow samples.

Wednesday, September 25, 2019 10:47:24 AM DRAWING: P:\0113 Brownstein Hyatt & Forber\0113.053.00 18CW3121 Lupton Bottom COU\26(o)(2) Report\Figures\Fig 2-1.DWG







AURORA WATER ♦ Water Supply

— Aqueducts, diversion tunnels, pipelines — Streams, canals, reservoirs  
 — Major roads, highways — Continental Divide



**BEFORE THE COLORADO WATER CONSERVATION BOARD  
DEPARTMENT OF NATURAL RESOURCES, STATE OF COLORADO**

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**IN THE MATTER OF THE RULEMAKING HEARING FOR CONSIDERATION OF  
AMENDMENTS TO THE COLORADO WATER CONSERVATION BOARD'S RULES  
CONCERNING THE COLORADO INSTREAM FLOW AND NATURAL LAKE LEVEL  
PROGRAM, 2 CCR 408-2**

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**PREHEARING STATEMENT OF THE COLORADO WATER TRUST**

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The Colorado Water Trust hereby submits this Prehearing Statement for the public rulemaking hearing before the Colorado Water Conservation Board ("CWCB" or "Board") for consideration of amendments to the Rules Concerning the Colorado Instream Flow and Natural Lake Level Program, 2 CCR 408-2 ("ISF Rules").

**I. Statement of Position**

**The Colorado Water Trust supports the proposed amendments to the ISF Rules.** CWCB Staff drafted the amended ISF Rules that implement provisions of House Bill 20-1157 and that update references to the CWCB website and to Colorado Parks and Wildlife. In its Notice of Public Rulemaking Hearing dated October 14, 2020, the CWCB provided notice to the public that the "Board is amending the Rules to: (1) address the requirements of House Bill 20-1157; (2) update a reference to the Board's website; and (3) update references to Colorado Parks and Wildlife ('CPW')." The Colorado Water Trust supports all three topics of proposed amendment and the specific language that CWCB Staff has drafted.

**II. Witness List**

A. Kate Ryan, Senior Staff Attorney for the Colorado Water Trust

Ms. Ryan will testify regarding House Bill 20-1157 and its rulemaking directives, the rulemaking process and outreach, and legal aspects of the proposed amendments to the ISF Rules and the rulemaking process. Her resume is attached as Exhibit 1.

B. Mickey O'Hara, Director of Programs for the Colorado Water Trust

Mr. O'Hara will testify regarding the application of the proposed amendments to the ISF Rules to Colorado Water Trust projects. His resume is attached as Exhibit 2.

**III. Statement of Open Legal Questions**

The Colorado Water Trust does not identify any open legal questions at this time. It reserves the opportunity to address any open legal questions identified by other parties in its Rebuttal Statement.

**IV. Statement of Relief Requested**

The Colorado Water Trust requests that the Board approve the amendments to the ISF Rules using the proposed language that CWCB Staff drafted and noticed pursuant to section 24-4-103, C.R.S.

**V. Time Requested at the Hearing**

The Colorado Water Trust requests 10 minutes total for the presentations of Ms. Ryan and Mr. O'Hara.

**VI. Exhibit List**


- A. CWT-1: Resume of Kate Ryan
- B. CWT-2: Resume of Mickey O'Hara
- C. CWT-3: ISF Loan Project Descriptions
- D. Exhibits introduced by other Parties

The Colorado Water Trust will present statements and testimony in support of the CWCB Staff's proposed ISF Rules because they provide clarification for implementing the Temporary Loan Program, because the proposed rules are consistent with the statutory language and with the General Assembly's intent in amending the statute, and because the proposed rules correctly update references to the CWCB website and Colorado Parks and Wildlife. The Colorado Water Trust supported House Bill 20-1157 in the legislative session because the expanded Temporary Loan Program provides water users with greater flexibility to voluntarily loan water to the CWCB for instream flow use and provides greater streamflow restoration opportunities, all while maintaining protection to other water rights on Colorado's rivers. The Colorado Water Trust will provide information on its past experiences under the ISF Rules and the Temporary Loan Program and can describe how, based on that experience, it anticipates the amended ISF Rules will operate.

The Colorado Water Trust reserves the right to address testimony of other Parties and/or to utilize any Exhibits introduced by other Parties at the Rulemaking Hearing.

Respectively submitted this 10<sup>th</sup> day of December, 2020.

THE COLORADO WATER TRUST

A handwritten signature in black ink, appearing to read 'Kate Ryan', is written over a horizontal line.

Kate Ryan, Esq.

3264 Larimer Street, Suite D  
Denver, CO 80205  
Phone: (720) 570-2897  
Email: [kryan@coloradowatertrust.org](mailto:kryan@coloradowatertrust.org)

SENIOR STAFF ATTORNEY FOR THE COLORADO  
WATER TRUST

## **CERTIFICATE OF SERVICE**

I hereby certify that I have duly served the copies of the foregoing **Prehearing Statement of the Colorado Water Trust** upon all parties herein by email, this 10th day of December, 2020, addressed as follows:

### **Hearing Officer**

<p>Amy Beatie Deputy Attorney General Natural Resources &amp; Environment Section Office of the Colorado Attorney General 1300 Broadway, 7th Floor Denver, Colorado 80203 720-508-6296 Email: <a href="mailto:Amy.Beatie@coag.gov">Amy.Beatie@coag.gov</a> Copy to: <a href="mailto:John.Watson@coag.gov">John.Watson@coag.gov</a></p>
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### **Rulemaking Parties**

<u>Staff to the Colorado Water Conservation Board</u>  Linda Bassi Colorado Water Conservation Board 1313 Sherman Street, Room 718 Denver, CO 80203 303-866-3441, ext. 3204 Email: <a href="mailto:linda.bassi@state.co.us">linda.bassi@state.co.us</a>	<u>The Nature Conservancy</u>  Aaron Citron 2424 Spruce Street Boulder, CO 80302 520-730-3421 Email: <a href="mailto:aaron.citron@tnc.org">aaron.citron@tnc.org</a>
<u>Colorado Water Trust</u>  Kate Ryan 3264 Larimer Street, Suite D Denver, CO 80205 720-570-2897 Email: <a href="mailto:kryan@coloradowatertrust.org">kryan@coloradowatertrust.org</a>	<u>City of Aurora</u>  <i>Counsel:</i>  John M. Dingess 3600 S. Yosemite Street, Suite 500 Denver, CO 80237 303-779-0200 Email: <a href="mailto:jdingess@hrodllaw.com">jdingess@hrodllaw.com</a> ; <a href="mailto:mail@hrodllaw.com">mail@hrodllaw.com</a>

	<p><i>Staff Contact:</i></p> <p>Erich Fowler 15151 E. Alameda Parkway, Suite 3600 Aurora, CO 80012 303-739-7467 Email: <a href="mailto:esfowler@auroragov.org">esfowler@auroragov.org</a></p>
<p><u>Mesa County, Colorado</u></p> <p>Amber Swasey Mesa County Community Development P.O. Box 20,000-5022 Grand Junction, CO 81502 970-244-1762 Email: <a href="mailto:amber.swasey@mesacounty.us">amber.swasey@mesacounty.us</a></p>	<p><u>Trout Unlimited</u></p> <p>Drew Peternell Trout Unlimited P.O. Box 4165 Eagle, CO 81631 303-20-3057 Email: <a href="mailto:drew.peternell@tu.org">drew.peternell@tu.org</a></p>
<p><u>Western Resource Advocates, Conservation Colorado, and the National Audubon Society</u></p> <p>John Cyran 2260 Baseline Road Boulder, CO 80302 303-746-3802 Email: <a href="mailto:john.cyran@westernresources.org">john.cyran@westernresources.org</a></p>	<p><u>Colorado River Water Conservation District</u></p> <p>Peter C. Fleming Jason V. Turne Lorra Nichols Colorado River Water Conservation District P.O. Box 1120 Glenwood Springs, CO 81602 970-945-8522 Email: <a href="mailto:pfleming@crwcd.org">pfleming@crwcd.org</a> <a href="mailto:jturner@crwcd.org">jturner@crwcd.org</a> <a href="mailto:lnichols@crwcd.org">lnichols@crwcd.org</a></p>
<p><u>Colorado Parks and Wildlife</u></p> <p><i>Counsel:</i></p> <p>Elizabeth Joyce 1300 Broadway, 7th Floor Denver, CO 80203 720-508-6761 Email: <a href="mailto:elizabeth.joyce@coag.gov">elizabeth.joyce@coag.gov</a></p> <p><i>Staff Contacts:</i></p> <p>Katie Birch Rob Harris 6060 Broadway Denver, CO 80216 303-291-7335 303-291-7550 Email: <a href="mailto:katie.birch@state.co.us">katie.birch@state.co.us</a> <a href="mailto:robert.harris@state.co.us">robert.harris@state.co.us</a></p>	

/s/ 



## Kate Ryan

Senior Staff Attorney for the Colorado Water Trust

Email: [kryan@coloradowatertrust.org](mailto:kryan@coloradowatertrust.org) | Phone: 720.570.2897

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### Professional Summary

Kate Ryan has over fifteen years of experience working in Colorado Water Law. Having come from a background in arctic climate and snow hydrology, she began her legal career clerking for Justice Gregory J. Hobbs of the Colorado Supreme Court. After several years of private practice during which she worked for farming, ranching, and municipal clients throughout Colorado, she joined the Office of the Attorney General where she represented the State and Division Engineers, and the Colorado Water Conservation Board in defending and adjudicating instream flow water rights. Kate has taken cases through water court and successfully argued appeals before the Colorado Supreme Court. Kate joined the Colorado Water Trust in 2019.

### Education

J.D. University of California, Berkeley School of Law

- Editor-in-Chief of *Ecology Law Quarterly*
- Recipient of Barry S. Sandals Fellowship for Environmental Legal Work

M.A. University of Colorado, Boulder, Colorado – (Geography/Arctic Climatology)

- 2000, 2001 University of Colorado Graduate Student Fellowship
- 2001 American Geophysical Union Award for Outstanding Student Paper
- 2002 Conference Fellowship, Columbia University Center for Science, Policy & Outcomes

B.S. College of William and Mary, Williamsburg, VA – (Environmental Science)

- Phi Beta Kappa, Geology Honor Society, French Honor Society
- *Honors Thesis*: “Evaluating Potential Geologic Contributions to Eutrophication of Lake Matoaka”

### Selected Employment History

*Senior Staff Attorney, Colorado Water Trust*

*2019–Present*

- Lead for legal support of Colorado Water Trust projects including transactional and litigation counsel, negotiation of agreements and stipulations with water users, and production of title opinions.
- Oversees the planning, implementation, and deliverables of projects.

*Special Counsel, Berg Hill Greenleaf Ruscitti LLP*

*2015–2018*

- Water rights and water quality attorney; special counsel to clients across Colorado, including municipalities in the Front Range and San Luis Valley.

*Assistant Attorney General, Office of the Attorney General*

*2012–2015*

- Attorney for the Colorado Water Conservation Board and State and Division Engineers.

### Representative Projects

McKinley Ditch/Little Cimarron River

*Colorado Water Trust Partnership Project with Colorado Water Conservation Board*

Represented the Colorado Water Conservation Board in water court application so that the McKinley Ditch water right could be used for irrigation and instream flow pursuant to a split-season water use agreement. Successfully addressed concerns of the Division Engineer regarding water availability and administration concerns.

## EXHIBIT CWT-1

### Terrace Reservoir/Alamosa River

*Colorado Water Trust Partnership with Colorado Water Conservation Board and Alamosa Riverkeeper*  
Represented the Colorado Water Conservation Board in water court application so that irrigation water rights could be stored in Terrace Reservoir and released to provide instream flow and extend the season in which the Alamosa River does not run dry. Successfully addressed concerns of water users on the ditch from which water rights were changed.

### Tributaries to the North Fork Gunnison River

*Colorado Water Conservation Board*

Resolved opposition to contested instream flow appropriations on tributaries to the North Fork Gunnison River. Met with local stakeholders and water commissioner to successfully address their concerns.

## Civic Engagements

Water Resources Advisory Board of the City of Boulder, 2010-2013; 2016-2020

Foothill Elementary School Volunteer, 2015-2020

## SELECTED PUBLICATIONS & PRESENTATIONS

Regular Guest Lecturer at University of Colorado Law School and Geography Department, University of Law School.

Katherine Ryan, *Has the Well Really Run Dry?*, CLE International Western Water Law, Las Vegas, NV (2018).

Kate Ryan, Aaron Ladd and Ema Schultz, *Changes of Water Rights Quantifying Consumptive Use*, Boulder County Bar CLE (April 2016).

Katherine Ryan, *Colorado Legal and Legislative Update*, CLE International Law of the Rio Grande, Santa Fe, NM (2016).

Katherine A.D. Ryan, *Water Rights in the West*, Lecture for the Water in the Western United States “Coursera”, Western Water Assessment (2015).

Katherine A.D. Ryan, *Easements and Access to Water*, Colorado Water Officials Association (2014).

Katherine A.D. Ryan, *Unilateral Ditch Modification*, 38 COLO. LAWYER 37 (2009).

Katherine Daniels Ryan, *Preservation Prevails over Commercial Interests in the Wilderness Act: Wilderness Society v. United States Fish & Wildlife Service*, 32 ECOLOGY L.Q. 539 (2005).

Katherine Daniels Ryan, *The Supreme Court Modifies Homestead Claimants' Property Rights in BedRoc Ltd. v. United States*, 32 ECOLOGY L.Q. 683 (2005).

Katherine Daniels, Richard Armstrong, Melinda Marquis, and Donna J. Scott. *Passive Microwave Data from the National Snow and Ice Data Center: a Summary of Acquisitions, Tools, and Applications*, Symposium on Advances in Microwave Remote Sensing Applications, IIT Bombay, India (2003).

Shari Fox and Katherine Daniels, *Climate Variability in the Eastern Canadian Arctic: Linking Inuit Knowledge and Meteorological Data*, Association of American Geographers, 2002 Annual Meeting, Los Angeles (2002).

Katherine Daniels and Konrad Steffen, *Recent Climate Variability in the Canadian Arctic: Implications for Ice Caps*, 82(47) EOS TRANS. AGU, Fall Meeting Supplement (2001).

Konrad Steffen, Katherine Daniels et al., *Surface Temperature Increase of the Greenland Ice Sheet in Recent Years*, 82(47) EOS TRANS. AGU, Fall Meeting Supplement (2001).

Colorado Water Trust | 3264 Larimer Street, Suite D | Denver, CO 80205 | [www.coloradowatertrust.org](http://www.coloradowatertrust.org)

## Mickey O'Hara

Director of Programs

Email: [mohara@coloradowatertrust.org](mailto:mohara@coloradowatertrust.org) | Phone: 720.570.2897

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### Professional Summary

Mickey O'Hara has over five years of experience developing and implementing river restoration projects in the American West, with a focus on water rights transactions. His work includes the design of flow restoration projects, project management, fundraising, monitoring and stewardship, and outreach.

### Education

B.S. Colorado School of Mines, Golden, CO – Environmental Engineering

### Employment History

*Director of Programs, Colorado Water Trust* 2020-Present

- Lead programmatic efforts to develop and implement innovative flow restoration projects throughout Colorado, oversee technical and legal staff
- Design and develop streamflow restoration projects – including technical analyses to assess offered water rights, preparation of applications, plans and reports, outreach activities, and management of contractors
- Manage, implement, and monitor all aspects of streamflow restoration projects across Colorado ranging from infrastructure projects to Temporary ISF Loans to permanent water sharing agreements

*Water Resources Engineer, Colorado Water Trust* 2016–2019

- Design and develop streamflow restoration projects – including technical analyses to assess offered water rights, preparation of applications, plans and reports, outreach activities, and management of contractors
- Manage, implement, and monitor all aspects of streamflow restoration projects across Colorado ranging from infrastructure projects to Temporary ISF Loans to permanent water sharing agreements

*Program Specialist, Lefthand Watershed Oversight Group* 2016

- Member of small team that developed and managed restoration projects in Left Hand Creek in response to the 2013 flood
- Duties included reviewing consultant proposals, selecting and managing consultants, project management, organizing and leading volunteer events, and significant outreach to a community that had survived a recent disaster

*Riparian Restoration Coordinator, AmeriCorps/The Nature Conservancy* 2015

- Collaborated with partners in Arizona's Verde River valley to design, implement, and monitor restoration projects including irrigation efficiency projects, conveyance efficiency projects, and diversion reduction agreements
- Conducted extensive operations and monitoring activities including installation and maintenance of agricultural infrastructure, hydrological monitoring including establishment of temporary stream gages, development of rating curves

### Representative Projects

Stagecoach Reservoir Temporary Instream Flow Loan

*Yampa-White Basin, Colorado Water Trust Partnership Project with Colorado Water Conservation Board*  
Managed implementation of Temporary ISF Loan between Upper Yampa Water Conservancy District and the Colorado Water Conservation Board. This included development of a Yampa River shortage forecast

## CWT - EXHIBIT 2

tool, negotiation of annual lease agreements with Upper Yampa WCD and the City of Steamboat Springs, project management and coordination with state agencies, water providers, water users, and other stakeholders to achieve project goals, fundraising, and additional stewardship tasks.

Coats Bros Ditch Temporary Instream Flow Loan

*Gunnison Basin, Colorado Water Trust Partnership Project with Colorado Water Conservation Board, Trout Unlimited*

Managed implementation of Temporary ISF Loan between Kruthaupt family and the Colorado Water Conservation Board. This included streamflow forecasting, coordination with staff at Division of Water Resources, Trout Unlimited, and CWCB, stewardship site visits and diversion record coding.

Stewardship Program

*Statewide, Colorado Water Trust*

Developed a programmatic approach to stewardship of flow restoration projects that allows the Water Trust to effectively manage, implement, and evaluate its ongoing flow restoration projects across the state, many of which are collaborations with CWCB. Duties associated with stewardship of flow restoration projects include annual implementation decisions, implementation, monitoring of benefits, coordination with water rights owners, state water officials, CWCB and other project partners, and reporting.



## INSTREAM FLOW LOAN PROJECT DOCUMENTATION

December 10, 2020

This document summarizes selected projects with which the Colorado Water Trust has been involved using the Colorado Water Conservation Board (CWCB) Instream Flow Loan Program (ISF Loan Program) established in 2002 at section 37-83-105 of the Colorado Revised Statutes. We selected these projects to document because they could be continued or improved pursuant to House Bill 20-1157 and the proposed Rules Concerning the Colorado Instream Flow and Natural Lake Level Program (ISF Rules).

These selected projects also highlight a distinction between how House Bill 20-1157 and the proposed ISF Rules will improve loans of direct flow water rights and stored water rights. The original ISF Loan Program enabled water users to loan water to the CWCB to *preserve* the environment to a reasonable degree on stream reaches where the CWCB has a decreed instream flow water right. Because of this, loans could only be implemented when the CWCB's ISF water rights were short, and only up to decreed appropriative rates. House Bill 20-1157 and the proposed ISF Rules will enable water users to loan water to the CWCB to *improve* the environment to a reasonable degree on stream reaches where the CWCB has a decreed instream flow water right. The Colorado Water Trust's experience working on ISF loans shows us that under the new ISF Loan Program, the direct flow water users we have worked with in the past will encounter more frequent opportunities for loaning their water for use by the CWCB. Stored water users and direct flow water users who are new to the program will encounter more frequent opportunities for loaning their water for use by the CWCB, and they will also be able to loan a greater volume of water for use by the CWCB.

For more information on the projects, please visit these websites: <http://coloradowatertrust.org/projects-map> and <http://cwcb.state.co.us/environment/instream-flow-program/Pages/TemporaryLoansWaterRightsInstreamFlows.aspx>.

### **Coats Bros. Ditch on Tomichi Creek, Division 4**

Operational Overview: This is a project that can operate for a ten-year period but it has only operated once during the first six years of that ongoing period. The Coats Bros. Ditch loan for instream flow was approved in 2015 and implemented in 2018, returning 202.7 acre-feet (af) of water to Tomichi Creek during extreme low-flow conditions. If the Colorado Water Trust could use House Bill 20-1157 and the proposed ISF Rules for renewals for the ten-year approval period and the water right owner were interested, the project would likely operate during renewed loan periods. Additionally, if Colorado Parks and Wildlife (CPW) were to propose and the CWCB were to approve flow rates to improve the environment to a reasonable degree under the proposed ISF Rules, then the water right owner could elect to loan water to the CWCB for instream flow use more frequently in a ten-year period—possibly up to five in ten years.

Additional Project Details: The Coats Bros. Ditch diverts water from the west side of Tomichi Creek to irrigate the Kruthaupt Ranch near Gunnison. The ditch is decreed for more than 19 cubic feet per second (cfs) under three separate priorities with appropriation dates ranging from 1879 to 1887. The Kruthaupt family owns more than 3 cfs in the two senior-most priorities. In average and dry streamflow years, Tomichi Creek experiences localized dry-ups.

Under the ISF Loan Program, Trout Unlimited, the Colorado Water Trust and the CWCB partnered with the Kruthaupt family to share use of the Coats Bros. Ditch for both irrigation and instream flow purposes. During years when the lease is implemented, the Kruthaupts will use the water rights for irrigation of hay meadows and

## EXHIBIT CWT-3

pasture grass on the same land historically irrigated by those water rights. In July or August, the Kruthaupts will cease diversions, and the CWCB will use the Coats Bros. Ditch water rights to protect up to 12.3 miles of instream flows in Tomichi Creek. In May of 2015, the Division Engineer approved a loan application for more than 3 cfs in the Coats Bros. Ditch for split-season instream flow use.

### **Winter Park Ranch Water & Sanitation District Diversions from Tributaries to the Fraser River, Division 5**

Operational Overview: This is a project that can operate for a ten-year period but it has only operated once during the first six years of that ongoing period. The Winter Park Ranch Water and Sanitation District's (Winter Park Ranch WSD) loan for instream flow was implemented in 2013, leaving 77.3 af of water in St. Louis Creek and the Fraser River. We believe it is unlikely that the project would be operated for five years out of ten, but if the proposed ISF Rules are approved and there are renewals for the ten-year approval period and the water right owner were interested, the project could operate during renewed loan periods. Additionally, if CPW were to propose and the CWCB were to approve flow rates to improve the environment to a reasonable degree under the proposed ISF Rules, then the water right owner could elect to loan water to the CWCB for instream flow use more frequently in a ten-year period.

Additional Project Details: In 2013, the Colorado Water Trust facilitated a lease from Winter Park Ranch Water and Sanitation District to the CWCB in order to supplement streamflow in St. Louis Creek and the Fraser River.

CWCB staff installed two staff gages in order to facilitate administration, and made several flow measurements on St. Louis Creek and the Fraser River to develop rating curves. Winter Park Ranch WSD staff recorded weekly gage measurements and photographed the streams during the full period of lease operation. Late season rains delivered quite a bit more moisture to the Fraser Valley than was initially forecast, and the instream flow water right on St. Louis Creek remained fully satisfied throughout the summer. The instream flow right on the Fraser River, however, did experience a short-term flow shortage in late July, which benefited from the ISF Loan. In late November, the Division of Water Resources notified CWCB and Colorado Water Trust that the Shoshone call had come on the Colorado River triggering the need to provide replacement water for non-irrigation season depletions attributable to the lease. Through a prior arrangement, Winter Park Ranch WSD began releasing augmentation water from its Village Ponds to replace those depletions.

### **Bunte Highline Ditch on Willow Creek, Division 5**

Operational Overview: This is a water right used in the ISF Loan Program during one year, and under the ISF Loan statute we believed it unlikely that it would be operated again due to changed reservoir operations upstream on the Colorado River that make a shortage condition to the ISF unlikely. This lease was approved for two years but it was only implemented for one. The lease operated for 79 days during the summer of 2012. The leased water benefitted four instream flow water rights totaling 34 Colorado River miles. Using House Bill 20-1157 and the proposed ISF Rules, if CPW were to propose and the CWCB were to approve flow rates to improve the environment to a reasonable degree under the proposed ISF Rules, then the water right owner could elect to loan water to the CWCB for instream flow use more frequently in a ten-year period—possibly up to five in ten years. The water right owner could also consider applying for two additional ten-year approval periods.

Additional Project Details: In early May of 2012, Aspen-Shorefox, LLC offered three water rights totaling 40 cfs from the Bunte Highline Ditch for lease. The Bunte Highline Ditch diverts water from Willow Creek just north of Granby in Grand County. The Bunte Highline Ditch water rights were the first irrigation water rights approved for instream flow use through the administrative approval process. The Division Engineer determined that the Colorado Water Trust and the landowners would need to operate a recharge pond to meet return flow obligations. The parties constructed a headgate to turn water out of the Bunte Highline Ditch and installed a measuring device to measure water as it flowed into an existing recharge pond, accounting for delayed return

## EXHIBIT CWT-3

flows to the Colorado River. Water administration also required coordination with the local Water Commissioner and Northern Colorado Water Conservancy District (Northern Water). Northern Water released water from Willow Creek Reservoir to provide water to the Bunte Highline Ditch water rights; and they also helped shepherd water through the Windy Gap Reservoir to benefit the downstream, Colorado River instream flow water rights to which the water was loaned.

### **Stagecoach Reservoir, Yampa River, Division 6**

Operational Overview: This is a project that operated three times in the first six years of a ten-year approval period. Under the ISF Loan Program, the project has restored approximately 7,400 af of water to the Yampa River for instream flow use. We believe it more probable than not that this project would operate for five years out of a ten-year approval period. We also think it is likely that if there were renewals for the ten-year approval period, the project would operate during renewed loan periods. Finally, if CPW were to propose and the CWCB were to approve flow rates to improve the environment to a reasonable degree under the proposed ISF Rules, then the water right owner could elect to loan a greater volume of water to the CWCB for instream flow use.

Additional Project Details: The project began with a partnership between the Colorado Water Trust, the CWCB, and the Upper Yampa Water Conservancy District (UYWCD) in 2012. During the 2012 drought, the partners executed the first-ever lease of water to the ISF Loan Program. The Colorado Water Trust and CWCB leased water again in 2013 and 2017.

Building on the success of the short-term lease and running out of years to lease water under the ISF Loan Program, the partners used a new legal strategy for releasing water in 2015. With the help of UYWCD and the City of Steamboat Springs (Steamboat Springs), the Colorado Water Trust purchased stored water and made releases in 2015 and 2016 for municipal use by Steamboat Springs. In early summer of 2017, the Yampa River was one of the only rivers in the state with below-average streamflow. In response, the Colorado Water Trust purchased and released water under the ISF Loan Program for use in CWCB's instream flow reach and it also purchased water for downstream municipal use by the Steamboat Springs. In 2018 and 2020, the Colorado Water Trust again purchased water for downstream municipal use by Steamboat Springs. In total, the Stagecoach Reservoir release project has restored flow to the Yampa for instream flow and/or municipal use in seven of the past nine years. Releases for municipal use have restored an additional 4,800 af of water to the Yampa River beyond the releases for instream flow use.

### **Lake Avery on Big Beaver Creek, tributary to the White River, Division 6**

Operational Overview: This is a project that was operated three times during its existing a ten-year approval period. The Lake Avery ISF Loan was implemented in 2012, releasing 1,250 af of water out of Lake Avery on Big Beaver Creek to benefit low flow and high water temperature conditions in the White River. The loan operated again in 2018 and 2020. Additional opportunities to implement the Lake Avery loan may benefit flow conditions in the White River in the future. Finally, if CPW were to propose and the CWCB were to approve flow rates to improve the environment to a reasonable degree under the proposed ISF Rules, then the water right owner could elect to loan a greater volume of water to the CWCB for instream flow use.

Additional Project Details: During the drought in 2002, which took place before the ISF Loan Program was codified in statute, CPW convened meetings with local irrigators, the angling community, local government and water officials to discuss options for addressing low flows in the White River east of Meeker. The result was a verbal agreement under which CPW released stored water from Lake Avery (its decreed name is Big Beaver Creek Reservoir) without legal protection from diversion but with general consensus from water users to leave the released water in the White River. In 2012, CPW and the CWCB entered into a ten-year water lease agreement, under which CPW released 1,250 af of water from Lake Avery at a rate of 18 cfs from August 30 to

### EXHIBIT CWT-3

October 3 to keep some water flowing in the White River and to lower water temperature. CPW considered making releases in 2014 and 2016 when it observed stress in the White River fishery, but decided not to due to the 3-in-10 constraint of the ISF Loan Program. In 2018 and 2020, CPW again exercised its lease, to increase flows in the instream flow reach in the White River.



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

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**IN THE MATTER OF REVISIONS TO COLORADO WATER CONSERVATION  
BOARD'S RULES CONCERNING THE COLORADO INSTREAM FLOW AND  
NATURAL LAKE LEVEL PROGRAM, 2 CCR 408-2**

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**PREHEARING STATEMENT OF COLORADO PARKS AND WILDLIFE**

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Colorado Parks and Wildlife (CPW) submits this Prehearing Statement in the rulemaking hearing to consider revisions to Colorado Water Conservation Board's Rules Concerning the Colorado Instream Flow and Natural Lake Level Program (Rules).

**I. Statement of CPW's Interest**

CPW's mission is to perpetuate the wildlife resources of the state, provide a quality state park system, and provide enjoyable and sustainable outdoor recreation opportunities that educate and inspire current and future generations to serve as active stewards of Colorado's natural resources. CPW also has a statutorily prescribed role to support the Colorado Water Conservation Board (CWCB or the Board) as it implements the Instream Flow and Natural Lake Level Program (ISF Program) by providing biological expertise and recommendations regarding CWCB's ISF Program, including permanent acquisitions and temporary loans or leases for instream flow purposes.

CPW is a party in this hearing to review the revisions to the Rules proposed by CWCB Staff (Staff) to the Board, to review and respond to testimony submitted by other parties or public comment, as needed, and to ensure that any revisions adopted by the Board are consistent with section 37-83-105, C.R.S., and the intent of the ISF Program.

## **II. Background**

During the 2020 session of the Colorado General Assembly, the legislature passed HB 20-1157, to amend several provisions of section 37-83-105, C.R.S., which provides the CWCB authority to accept temporary loans of water for instream flow purposes (the ISF loan program). Prior to the passage of this legislation, the statute allowed water users to loan water to the CWCB for up to one hundred twenty days in up to three calendar years during a ten-year period, with no renewal. The amended statute expanded the ISF loan program to include both expedited and renewable loans. The amended statute provides that expedited loans are authorized for a term of one year, while renewable loans may operate in up to five years during a ten-year period and may be renewed for up to two additional ten-year periods. The amended statute also provides that CWCB may accept expedited loans to preserve the natural environment to a reasonable degree on stream reaches with a decreed instream flow water right. Renewable loans may be used for the purpose of preserving or improving the natural environment to a reasonable degree on stream reaches with a decreed instream flow water right.

## **III. Written Testimony**

To carry out its statutory mission, CPW's policies and programs include efforts to develop and protect a wide range of aquatic resources. CPW owns water rights and interests in water which it uses in support of its programs, for the benefit of the public, for use on its properties, and to sustain fisheries across the state. CPW has both participated in the ISF Program in a variety of ways and benefited from other participants' use of the legal tools allowed by the program, including use of water under the ISF loan program. Finally, CPW is also statutorily directed to provide recommendations to the CWCB in support of the CWCB's ISF Program. Thus, CPW has

reviewed the proposed revisions to the Rules as a water user, a beneficiary of the ISF program, and as an agency that will assist in implementing the proposed Rules.

The ISF loan program, when implemented appropriately to preserve or improve the natural environment to a reasonable degree, is an important mechanism that can advance CPW's mission to protect, preserve, enhance, and manage wildlife for the use, benefit, and enjoyment of the Coloradans and visitors to Colorado. CPW also believes that the intent of HB 20-1157 is to make the ISF loan program more flexible for ISF loan program applicants, while maintaining adequate protections for water users.

The purpose of the instant proceeding is for the Board to promulgate rules to incorporate revisions pursuant to, and as directed and limited by, HB 20-1157. In addition to proposed revisions to the Rules to incorporate the substantive changes under HB 20-1157, Staff proposed limited updates to references within the Rules to make them consistent with changes to the CWCB's website and CPW's agency name change. CPW supports the Rule revisions proposed by Staff and believes they are consistent with HB 20-1157 and the intent of the ISF Program.

#### A. Proposed Changes to Rule 6.k and 6.m

Staff have proposed a number of revisions to Rules 6.k and 6.m to address changes to the CWCB's loan program under section 37-83-105, C.R.S., as implemented by HB 20-1157. In the proposed revisions, Staff drafted:

- i. Definitions of expedited and renewable loans;
- ii. Notice requirements for both types of loan;
- iii. Procedures for evaluating and requesting approval of expedited loans, and for Board review and potential ratification of the CWCB Director's decision on such

loans;

- iv. A Board process for reviewing, receiving public input on, and directing staff on whether to move forward with a proposed renewable loan, including a hearing under ISF Rule 6m(5)., if requested;
- v. Steps the Board must take for proposed renewable loans that would improve the natural environment to a reasonable degree, including requesting and reviewing a biological analysis from CPW on the extent to which the proposed loan will improve the natural environment to a reasonable degree, and giving preference for loans of stored water, when available, over loans of direct flow water;
- vi. A process for the Board's consideration of potential injury to decreed water rights, decreed exchanges of water, or undecreed existing exchanges of water, to the extent that the undecreed existing exchanges have been administratively approved before the date of the Board's consideration;
- vii. A Staff process for coordinating with a water rights owner on requesting approval from State Engineer of a proposed renewable loan (after Board review and decision); and,
- viii. A process for Board review and approval of renewing a loan for a second or third ten-year period.

Staff's proposed revisions to the Rules are narrowly tailored to implement changes enacted through HB 20-1157 while providing sufficient clarity and certainty to applicants and other water users as to how the provisions will be implemented and what limitations and restrictions will apply for the protection of other water users. The proposed revisions distinguish the roles of the CWCB, CPW, and the State Engineer under the added provisions of HB 20-1157, which remain consistent

with each entity's role under the prior ISF loan program and within the ISF Program more broadly. Finally, the proposed Rule revisions provide adequate direction to Staff and the Board on how to implement the statutory changes, including the relevant factors to be used to evaluate decisions to accept loans under the ISF loan program, while recognizing the Board's authority over final decision-making under the ISF loan program.

#### B. Proposed Changes to Rule 6.f, 7.d, 8.i, and 11.c

In 2011, the Colorado Division of Wildlife (DOW) and the Colorado Division of Parks and Outdoor Recreation (DPOR) merged into a single agency, known as Colorado Parks and Wildlife. As the successor in interest, CPW assumed the legal rights and obligations of DOW and DPOR. While many statutory references have been updated, because the CWCB has not engaged in an ISF rulemaking since 2011, the Rules still refer to the DOW and DPOR. In the proposed revisions to the Rules CWCB staff have included a number of updates to correct references to the merged agency. CPW supports the proposed changes to the Rules and appreciates the CWCB's efforts to make the Rules consistent with the merger and agency name change.

#### **IV. Required Statements**

- a) Position Statement: For the above stated reasons, CPW supports adoption of the proposed Rules.
- b) Witness List: At this time, CPW does not plan to present witnesses. CPW reserves the right to update its witness list as this proceeding progresses.
- c) Open Legal Questions: CPW has not identified any open legal questions. CPW reserves the right to update its position on this issue as the proceeding progresses.

- d) Relief Statement: CPW requests adoption of the proposed Rules.
- e) Amount of Time Desired at the Hearing: At this time, CPW is not requesting any time during the hearing to present witnesses. CPW reserves the right to request time as proceeding progresses.
- f) Exhibit list: CPW may rely on exhibits or evidence included in the administrative record for this proceeding, including information presented by other parties, or as needed for demonstrative or rebuttal purposes. CPW reserves the right to update its exhibit list as this proceeding progresses.

Submitted this 10<sup>th</sup> day of December, 2020.

**FOR COLORADO PARKS AND WILDLIFE**



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Reid DeWalt, Assistant Director for Aquatics, Terrestrial &  
Natural Resources  
Colorado Parks and Wildlife  
6060 Broadway  
Denver, Colorado 80216

## **CERTIFICATE OF SERVICE**

I hereby certify that I have duly served the copies of the foregoing **Prehearing Statement of Colorado Parks and Wildlife** upon all parties herein by email, this 10th day of December, 2020, addressed as follows:

### **Hearing Officer**

Amy Beatie Deputy Attorney General Natural Resources & Environment Section Office of the Colorado Attorney General 1300 Broadway, 7th Floor Denver, Colorado 80203 720-508-6296 Email: <a href="mailto:Amy.Beatie@coag.gov">Amy.Beatie@coag.gov</a>
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### **Rulemaking Parties**

<u>Staff to the Colorado Water Conservation Board</u>  Linda Bassi Colorado Water Conservation Board 1313 Sherman Street, Room 718 Denver, CO 80203 303-866-3441, ext. 3204 Email: <a href="mailto:linda.bassi@state.co.us">linda.bassi@state.co.us</a>	<u>The Nature Conservancy</u>  Aaron Citron 2424 Spruce Street Boulder, CO 80302 520-730-3421 Email: <a href="mailto:aaron.citron@tnc.org">aaron.citron@tnc.org</a>
<u>Colorado Water Trust</u>  Kate Ryan 3264 Larimer Street, Suite D Denver, CO 80205 720-570-2897 Email: <a href="mailto:kryan@coloradowatertrust.org">kryan@coloradowatertrust.org</a>	<u>City of Aurora</u>  <i>Counsel:</i>  John M. Dingess 3600 S. Yosemite Street, Suite 500 Denver, CO 80237 303-779-0200 Email: <a href="mailto:jdiness@hrodllaw.com">jdiness@hrodllaw.com</a> ; <a href="mailto:mail@hrodllaw.com">mail@hrodllaw.com</a>  <i>Staff Contact:</i>  Erich Fowler 15151 E. Alameda Parkway, Suite 3600 Aurora, CO 80012 303-739-7467 Email: <a href="mailto:esfowler@auroragov.org">esfowler@auroragov.org</a>
<u>Mesa County, Colorado</u>	<u>Trout Unlimited</u>

<p>Amber Swasey Mesa County Community Development P.O. Box 20,000-5022 Grand Junction, CO 81502 970-244-1762 Email: <a href="mailto:amber.swasey@mesacounty.us">amber.swasey@mesacounty.us</a></p>	<p>Drew Peterzell Trout Unlimited P.O. Box 4165 Eagle, CO 81631 303-20-3057 Email: <a href="mailto:drew.peterzell@tu.org">drew.peterzell@tu.org</a></p>
<p><u>Western Resource Advocates, Conservation Colorado, and the National Audubon Society</u></p> <p>John Cyran 2260 Baseline Road Boulder, CO 80302 303-746-3802 Email: <a href="mailto:john.cyran@westernresources.org">john.cyran@westernresources.org</a></p>	<p><u>Colorado River Water Conservation District</u></p> <p>Peter C. Fleming Jason V. Turne Lorra Nichols Colorado River Water Conservation District P.O. Box 1120 Glenwood Springs, CO 81602 970-945-8522 Email: <a href="mailto:pfleming@crwcd.org">pfleming@crwcd.org</a> <a href="mailto:jturner@crwcd.org">jturner@crwcd.org</a> <a href="mailto:lnichols@crwcd.org">lnichols@crwcd.org</a></p>
<p><u>Colorado Parks and Wildlife</u></p> <p><i>Counsel:</i></p> <p>Elizabeth Joyce 1300 Broadway, 7th Floor Denver, CO 80203 720-508-6761 Email: <a href="mailto:elizabeth.joyce@coag.gov">elizabeth.joyce@coag.gov</a></p> <p><i>Staff Contacts:</i></p> <p>Katie Birch Rob Harris 6060 Broadway Denver, CO 80216 303-291-7335 303-291-7550 Email: <a href="mailto:katie.birch@state.co.us">katie.birch@state.co.us</a> <a href="mailto:robert.harris@state.co.us">robert.harris@state.co.us</a></p>	

/s/ **Robert Harris** Digitally signed by Robert Harris  
Date: 2020.12.10 14:03:47 -07'00'



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**PREHEARING STATEMENT OF COLORADO RIVER WATER CONSERVATION DISTRICT**

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**PUBLIC RULEMAKING HEARING FOR CONSIDERATION OF AMENDMENTS TO RULES CONCERNING THE COLORADO INSTREAM FLOW AND NATURAL LAKE LEVEL PROGRAM (2-CCR 408-2 Rules)**

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The Colorado River Water Conservation District ("River District") hereby submits its prehearing statement concerning the Colorado Water Conservation Board's proposed amendments to the Rules Concerning the Colorado Instream Flow and Natural Lake Level Program.

**A. POSITION OF THE RIVER DISTRICT.**

The River District supports the CWCB's adoption of the proposed amendments to the Instream Flow and Natural Lake Level Rules submitted by CWCB staff on October 14, 2020.

**B. EXHIBITS TO BE INTRODUCED AT HEARING.**


The River District does not anticipate introducing exhibits at the CWCB Hearing but may refer to statutes, rules, or exhibits introduced or submitted by other parties to the CWCB Hearing.

**C. WITNESSES.**

The following individuals may provide testimony on behalf of the River District to support the position of the River District in this proceeding. In addition, the individuals below may provide testimony in rebuttal to testimony or evidence submitted by other parties.

Peter C. Fleming, Colorado River Water Conservation District, General Counsel  
Jason V. Turner, Colorado River Water Conservation District, Senior Counsel

Respectfully submitted on December 10, 2020.



---

Peter C. Fleming, General Counsel  
Jason V. Turner, Senior Counsel  
Colorado River Water Conservation District  
201 Centennial Street, Suite 200  
Glenwood Springs, Colorado 81601  
Phone: (970) 945-8522; Fax: (970) 945-8799  
E-mail: [pfleming@crwcd.org](mailto:pfleming@crwcd.org)  
[jturner@crwcd.org](mailto:jturner@crwcd.org)  
[lnichols@crwcd.org](mailto:lnichols@crwcd.org)

**CWCB Public Rulemaking Hearing 2 CCR 408-2 Rules**  
**CRWCD Prehearing Statement**  
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**CERTIFICATE OF SERVICE**

**IN THE MATTER OF THE RULEMAKING HEARING TO REVISE RULES CONCERNING THE COLORADO INSTREAM FLOW AND NATURAL LAKE LEVEL PROGRAM, 2 CCR 408-2**, I hereby certify that on December 10, 2020, a true and correct copy of the foregoing **PREHEARING STATEMENT OF THE COLORADO RIVER WATER CONSERVATION DISTRICT** was served via email to the Parties as follows:

**HEARING OFFICER:**

Amy Beatie Deputy Attorney General  
Natural Resources & Environment Section  
Office of the Colorado Attorney General  
1300 Broadway, 7th Floor  
Denver, Colorado 80203  
720-508-6295  
[amy.beatie@coag.gov](mailto:amy.beatie@coag.gov)  
Copy To: [john.watson@coag.gov](mailto:john.watson@coag.gov)

**PARTIES:**

Staff of the Colorado Water Conservation Board  
Linda Bassi  
Colorado Water Conservation Board  
1313 Sherman Street, Room 718  
Denver, CO 80203  
303-866-3441 ext. 3204  
[linda.bassi@state.co.us](mailto:linda.bassi@state.co.us)

Counsel for Staff of the Colorado Water Conservation Board  
Jen Mele  
Marc Sarmiento  
Allison Robinette  
Natural Resources & Environment Section  
Office of the Colorado Attorney General  
1300 Broadway, 7th Floor  
Denver, CO 80203  
720-508-6259  
[jennifer.mele@coag.gov](mailto:jennifer.mele@coag.gov)  
[marc.sarmiento@coag.gov](mailto:marc.sarmiento@coag.gov)  
[allison.robinette@coag.gov](mailto:allison.robinette@coag.gov)

The Nature Conservancy  
Aaron Citron  
2424 Spruce Street  
Boulder, CO 80302  
520-730-342  
[aaron.citron@tnc.org](mailto:aaron.citron@tnc.org)

Colorado Parks and Wildlife  
Staff Contacts:  
Katie Birch  
Rob Harris  
6060 Broadway  
Denver, CO 80216  
303-291-7335  
303-291-7550  
[katie.birch@state.co.us](mailto:katie.birch@state.co.us)  
[robert.harris@state.co.us](mailto:robert.harris@state.co.us)

Counsel:  
Elizabeth Joyce  
1300 Broadway  
Denver, CO 80203  
720-508-6761  
[elizabeth.joyce@coag.gov](mailto:elizabeth.joyce@coag.gov)

Colorado Water Trust  
Kate Ryan  
3264 Larimer Street, Suite D  
Denver, CO 80205  
720-570-2897  
[kryan@coloradowatertrust.org](mailto:kryan@coloradowatertrust.org)

City of Aurora  
Counsel:  
John M. Dingess  
3600 S. Yosemite Street, Suite 500  
Denver, Colorado 80237-1829  
303-779-0200  
[mail@hrodllaw.com](mailto:mail@hrodllaw.com)  
[jdingess@hrodllaw.com](mailto:jdingess@hrodllaw.com)

Staff Contact:  
Erich Fowler  
15151 E. Alameda Parkway, Suite 3600  
Aurora, Colorado 80012-1555  
303-739-7467  
[esfowler@auroragov.org](mailto:esfowler@auroragov.org)

**CWCB Public Rulemaking Hearing 2 CCR 408-2 Rules**  
**CRWCD Prehearing Statement**  
**Page 3**

Mesa County, Colorado  
Amber Swasey  
Mesa County Community Development  
PO Box 20,000-5022  
Grand Junction, CO 81502  
970-244-1762  
[amber.swasey@mesacounty.us](mailto:amber.swasey@mesacounty.us)

Trout Unlimited  
Drew Peternell  
Trout Unlimited  
P.O. Box 4165  
Eagle, Colorado 81631  
303-204-3057  
[drew.peternell@tu.org](mailto:drew.peternell@tu.org)

Western Resource Advocates  
Conservation Colorado  
National Audubon Society  
John Cyran  
2260 Baseline Road  
Boulder, CO 80302  
303-746-3802  
[john.cyran@westernresources.org](mailto:john.cyran@westernresources.org)



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Lorra Nichols

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**AMENDED PREHEARING STATEMENT OF COLORADO RIVER WATER CONSERVATION DISTRICT**

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**PUBLIC RULEMAKING HEARING FOR CONSIDERATION OF AMENDMENTS TO RULES CONCERNING THE COLORADO INSTREAM FLOW AND NATURAL LAKE LEVEL PROGRAM (2-CCR 408-2 Rules)**

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The Colorado River Water Conservation District (“River District”) hereby submits its prehearing statement concerning the Colorado Water Conservation Board’s proposed amendments to the Rules Concerning the Colorado Instream Flow and Natural Lake Level Program.

**A. POSITION OF THE RIVER DISTRICT.**

The River District supports the CWCB’s adoption of the proposed amendments to the Instream Flow and Natural Lake Level Rules submitted by CWCB staff on October 14, 2020.

**B. WITNESSES.**

The following individuals may provide testimony on behalf of the River District to support the position of the River District in this proceeding. In addition, the individuals below may provide testimony in rebuttal to testimony or evidence submitted by other parties.

Peter C. Fleming, Colorado River Water Conservation District, General Counsel

Jason V. Turner, Colorado River Water Conservation District, Senior Counsel

**C. STATEMENT OF OPEN LEGAL QUESTIONS.**

The River District does not identify any open legal questions at this time. It reserves the opportunity to address open legal questions identified by other parties in its rebuttal.

**D. STATEMENT OF RELIEF REQUESTED.**

The River District requests that the Board approve the amendments to the Instream Flow and Natural Lake Level Rules submitted by CWCB staff on October 14, 2020.

**CWCB Public ISF Rulemaking Hearing 2 CCR 408-2 Rules**  
**CRWCD Amended Prehearing Statement**  
**Page 2**

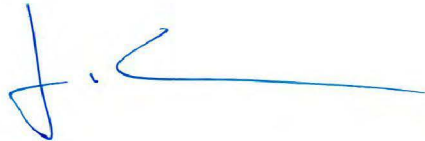
**E. TIME REQUESTED AT THE HEARING.**

The River District requests five (5) minutes at the hearing.

**F. EXHIBITS TO BE INTRODUCED AT HEARING.**

The River District does not anticipate introducing exhibits at the CWCB Hearing but may refer to statutes, rules, or exhibits introduced or submitted by other parties to the CWCB Hearing.

Respectfully submitted on December 14, 2020.



---

Peter C. Fleming, General Counsel  
Jason V. Turner, Senior Counsel  
Colorado River Water Conservation District  
P.O. Box 1120  
Glenwood Springs, Colorado 81602  
Phone: (970) 945-8522  
Fax: (970) 945-8799  
E-mail: [pfleming@crwcd.org](mailto:pfleming@crwcd.org)  
[jturner@crwcd.org](mailto:jturner@crwcd.org)  
[lnichols@crwcd.org](mailto:lnichols@crwcd.org)

**CWCB Public ISF Rulemaking Hearing 2 CCR 408-2 Rules  
CRWCD Amended Prehearing Statement  
Page 3**

**CERTIFICATE OF SERVICE**

**IN THE MATTER OF THE RULEMAKING HEARING TO REVISE RULES CONCERNING THE COLORADO INSTREAM FLOW AND NATURAL LAKE LEVEL PROGRAM, 2 CCR 408-2**, I hereby certify that on December 14, 2020, a true and correct copy of the foregoing **AMENDED PREHEARING STATEMENT OF THE COLORADO RIVER WATER CONSERVATION DISTRICT** was served via email to the Parties as follows:

**HEARING OFFICER:**

Amy Beatie Deputy Attorney General  
Natural Resources & Environment Section  
Office of the Colorado Attorney General  
1300 Broadway, 7th Floor  
Denver, Colorado 80203  
720-508-6295  
[amy.beatie@coag.gov](mailto:amy.beatie@coag.gov)  
Copy To: [john.watson@coag.gov](mailto:john.watson@coag.gov)

**PARTIES:**

Staff of the Colorado Water Conservation Board  
Linda Bassi  
Colorado Water Conservation Board  
1313 Sherman Street, Room 718  
Denver, CO 80203  
303-866-3441 ext. 3204  
[linda.bassi@state.co.us](mailto:linda.bassi@state.co.us)

Counsel for Staff of the Colorado Water Conservation Board  
Jen Mele  
Marc Sarmiento  
Allison Robinette  
Natural Resources & Environment Section  
Office of the Colorado Attorney General  
1300 Broadway, 7th Floor  
Denver, CO 80203  
720-508-6259  
[jennifer.mele@coag.gov](mailto:jennifer.mele@coag.gov)  
[marc.sarmiento@coag.gov](mailto:marc.sarmiento@coag.gov)  
[allison.robinette@coag.gov](mailto:allison.robinette@coag.gov)

The Nature Conservancy  
Aaron Citron  
2424 Spruce Street  
Boulder, CO 80302  
520-730-342  
[aaron.citron@tnc.org](mailto:aaron.citron@tnc.org)

Colorado Parks and Wildlife  
Staff Contacts:  
Katie Birch  
Rob Harris  
6060 Broadway  
Denver, CO 80216  
303-291-7335  
303-291-7550  
[katie.birch@state.co.us](mailto:katie.birch@state.co.us)  
[robert.harris@state.co.us](mailto:robert.harris@state.co.us)

Counsel:  
Elizabeth Joyce  
1300 Broadway  
Denver, CO 80203  
720-508-6761  
[elizabeth.joyce@coag.gov](mailto:elizabeth.joyce@coag.gov)

Colorado Water Trust  
Kate Ryan  
3264 Larimer Street, Suite D  
Denver, CO 80205  
720-570-2897  
[kryan@coloradowatertrust.org](mailto:kryan@coloradowatertrust.org)

City of Aurora  
Counsel:  
John M. Dingess  
3600 S. Yosemite Street, Suite 500  
Denver, Colorado 80237-1829  
303-779-0200  
[mail@hrodllaw.com](mailto:mail@hrodllaw.com)  
[jdingess@hrodllaw.com](mailto:jdingess@hrodllaw.com)

Staff Contact:  
Erich Fowler  
15151 E. Alameda Parkway, Suite 3600  
Aurora, Colorado 80012-1555  
303-739-7467  
[esfowler@auroragov.org](mailto:esfowler@auroragov.org)

**CWCB Public ISF Rulemaking Hearing 2 CCR 408-2 Rules**  
**CRWCD Amended Prehearing Statement**  
**Page 4**

Trout Unlimited  
Drew Peternell  
P.O. Box 4165  
Eagle, Colorado 81631  
303-204-3057  
[drew.peternell@tu.org](mailto:drew.peternell@tu.org)

Western Resource Advocates  
Conservation Colorado  
National Audubon Society  
John Cyran  
2260 Baseline Road  
Boulder, CO 80302  
303-746-3802  
[john.cyran@westernresources.org](mailto:john.cyran@westernresources.org)



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Lorra Nichols

**BEFORE THE COLORADO WATER CONSERVATION BOARD  
DEPARTMENT OF NATURAL RESOURCES, STATE OF COLORADO**

---

**IN THE MATTER OF THE RULEMAKING HEARING TO REVISE RULES CONCERNING THE  
COLORADO INSTREAM FLOW AND NATURAL LAKE LEVEL PROGRAM TO IMPLEMENT  
HOUSE BILL 20-1157, 2 CCR 408-2**

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**PREHEARING STATEMENT OF WESTERN RESOURCE ADVOCATES, CONSERVATION  
COLORADO, AND THE NATIONAL AUDUBON SOCIETY**

---

Western Resource Advocates (“WRA”), Conservation Colorado (“CoCo”), and the National Audubon Society (“Audubon”) hereby jointly submit this Prehearing Statement for the Colorado Water Conservation Board’s rulemaking hearing (“Rulemaking”) concerning CWCB Staff’s proposed amendments to the CWCB’s Instream Flow Rules (the “ISF Rules”) implementing House Bill 20-1157.

**I. Introduction and Statement of Position**

**WRA, CoCo, and Audubon support the CWCB’s proposed amendments to the ISF Rules.**

House Bill 20-1157 amends several provisions of C.R.S. § 37-83-105 (2019), which authorizes the CWCB to accept temporary loans of water for instream flow purposes, *inter alia*, to allow water users to loan water to the CWCB for up to five years during a ten-year period. House Bill 20-1157 also specifically directs the CWCB to promulgate rules that will govern its review and acceptance of loans pursuant to § 37-83-105. House Bill 20-1157 does not direct or authorize any other rulemaking.

WRA, CoCo, and Audubon support CWCB Staff’s proposed amendments to the ISF Rules because such amendments appropriately implement the provisions of House Bill 20-1157, consistent with the intent of the General Assembly, by providing water users with greater flexibility to voluntarily loan water to the CWCB for instream flow use and provides greater streamflow restoration opportunities, while maintaining protection to other water rights on Colorado’s rivers. In addition, the proposed amendments necessarily and appropriately update references in the ISF Rules to Colorado Parks and Wildlife and to the CWCB website.

WRA, CoCo and Audubon reserve the right to oppose additional amendments to the ISF Rules that may be proposed as part of this Rulemaking insofar as such amendments were not properly noticed or are inconsistent with the intent of the General Assembly in enacting House Bill 20-1157.

**II. Witness List**

Josh Kuhn, Water Advocate, Conservation Colorado.

Abby Burk, Western Rivers Regional Program Manager, Audubon Rockies.

Mr. Kuhn and Conservation Colorado and Ms. Burk and Audubon participated in the drafting of House Bill 20-1157, the stakeholder outreach, and in other matters related to the General Assembly’s enactment of the Bill. Mr. Kuhn and Ms. Burk may provide testimony addressing these matters as well as Conservation Colorado and other Bill proponents’ intent in drafting and supporting the Bill.

**III. Statement of Open Legal Questions**

At this time WRA, CoCo, and Audubon have not identified any open legal questions at issue in this Rulemaking. WRA, CoCo, and Audubon reserve the right to raise legal questions as such questions may arise in the course of this Rulemaking.

**IV. Statement of Relief Requested**



WRA, CoCo, and Audubon requests that the Board approve amendments to the ISF Rules substantively identical to Staff's proposed amendments as published and noticed.

**V. Time Requested at Hearing**

WRA, CoCo, and Audubon request 10 minutes total for the testimony of Josh Kuhn and Abby Burk.

**VI. Exhibit List**

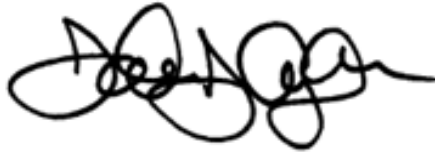
WRA, CoCo, and Audubon do not anticipate submitting any exhibits in this matter. WRA, CoCo, and Audubon reserve the right to add exhibits if need arises in the course of this Rulemaking.

**VII. Contact Person.**

For purposes of this rulemaking hearing only, John Cyran, Senior Staff Attorney for Western Resource Advocates, Healthy Rivers Program, shall be the contact person for WRA, CoCo, and Audubon. The appropriate mailing address, phone number, and email address for Mr. Cyran are listed in the address block below.

Respectively submitted this 10<sup>th</sup> day of December 2020.

WESTERN RESOURCE ADVOCATES



---

John Cyran, #23144

2260 Baseline Road

Boulder, CO 80302

Phone: (303)746-3802

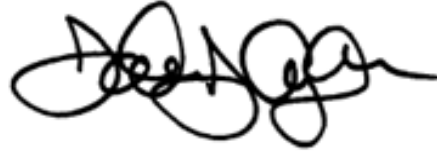
Email: [john.cyran@westernresources.org](mailto:john.cyran@westernresources.org)

Senior Staff Attorney, Healthy Rivers Program

On behalf of Western Resource Advocates, Conservation  
Colorado, and the National Audubon Society

## **CERTIFICATE OF SERVICE**

I hereby certify that I have duly served the copies of the foregoing **Prehearing Statement** upon all parties herein by email, this 10th day of December, 2020, addressed as follows:



### **Hearing Officer**

Amy Beatie  
Deputy Attorney General  
Natural Resources & Environment  
Section Office of the Colorado  
Attorney General 1300 Broadway, 7th  
Floor  
Denver, Colorado 80203  
720-508-6296  
Email: [Amy.Beatie@coag.gov](mailto:Amy.Beatie@coag.gov)

[Copy to: John.Watson@coag.gov](mailto:John.Watson@coag.gov)

### **Rulemaking Parties**

<u>Staff to the Colorado Water Conservation Board</u> Linda Bassi Colorado Water Conservation Board 1313 Sherman Street, Room 718 Denver, CO 80203 303-866-3441, ext. 3204 Email: <a href="mailto:linda.bassi@state.co.us">linda.bassi@state.co.us</a>	<u>The Nature Conservancy</u> Aaron Citron 2424 Spruce Street Boulder, CO 80302 520-730-3421 Email: <a href="mailto:aaron.citron@tnc.org">aaron.citron@tnc.org</a>
<u>Colorado Water Trust</u> Kate Ryan 3264 Larimer Street, Suite D Denver, CO 80205 720-570-2897 Email: <a href="mailto:kryan@coloradowatertrust.org">kryan@coloradowatertrust.org</a>	<u>City of Aurora</u> <i>Counsel:</i> John M. Dingess 3600 S. Yosemite Street, Suite 500 Denver, CO 80237 303-779-0200 Email: <a href="mailto:jdingess@hrodllaw.com">jdingess@hrodllaw.com</a> ; <a href="mailto:mail@hrodllaw.com">mail@hrodllaw.com</a>

	<p><i>Staff Contact:</i></p> <p>Erich Fowler  15151 E. Alameda Parkway, Suite 3600  Aurora, CO 80012  303-739-7467  Email: <a href="mailto:esfowler@auroragov.org">esfowler@auroragov.org</a></p>
<p><u>Mesa County, Colorado</u></p> <p>Amber Swasey  Mesa County Community Development  P.O. Box 20,000-5022  Grand Junction, CO 81502  970-244-1762  Email: <a href="mailto:amber.swasey@mesacounty.us">amber.swasey@mesacounty.us</a></p>	<p><u>Trout Unlimited</u></p> <p>Drew Peternell  Trout Unlimited  P.O. Box 4165  Eagle, CO 81631  303-20-3057  Email: <a href="mailto:drew.peternell@tu.org">drew.peternell@tu.org</a></p>
<p><u>Western Resource Advocates, Conservation Colorado, and the National Audubon Society</u></p> <p>John Cyran  2260 Baseline Road  Boulder, CO 80302  303-746-3802  Email: <a href="mailto:john.cyran@westernresources.org">john.cyran@westernresources.org</a></p>	<p><u>Colorado River Water Conservation District</u></p> <p>Peter C. Fleming  Jason V. Turne  Lorra Nichols  Colorado River Water Conservation District  P.O. Box 1120  Glenwood Springs, CO 81602  970-945-8522  Email: <a href="mailto:pfleming@crwcd.org">pfleming@crwcd.org</a>  <a href="mailto:jturner@crwcd.org">jturner@crwcd.org</a>  <a href="mailto:lnichols@crwcd.org">lnichols@crwcd.org</a></p>
<p><u>Colorado Parks and Wildlife</u></p> <p><i>Counsel:</i></p> <p>Elizabeth Joyce  1300 Broadway, 7th Floor  Denver, CO 80203  720-508-6761  Email: <a href="mailto:elizabeth.joyce@coag.gov">elizabeth.joyce@coag.gov</a></p> <p><i>Staff Contacts:</i></p> <p>Katie Birch  Rob Harris  6060 Broadway  Denver, CO 80216  303-291-7335  303-291-7550  Email: <a href="mailto:katie.birch@state.co.us">katie.birch@state.co.us</a>  <a href="mailto:robert.harris@state.co.us">robert.harris@state.co.us</a></p>	

**BEFORE THE COLORADO WATER CONSERVATION BOARD  
DEPARTMENT OF NATURAL RESOURCES, STATE OF COLORADO**

---

**IN THE MATTER OF THE RULEMAKING HEARING FOR CONSIDERATION OF  
AMENDMENTS TO THE COLORADO WATER CONSERVATION BOARD'S RULES  
CONCERNING THE COLORADO INSTREAM FLOW AND NATURAL LAKE LEVEL  
PROGRAM, 2 CCR 408-2**

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**PREHEARING STATEMENT OF THE NATURE CONSERVANCY**

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The Nature Conservancy hereby submits this Prehearing Statement for the public rulemaking hearing before the Colorado Water Conservation Board ("CWCB" or "Board") for consideration of amendments to the Rules Concerning the Colorado Instream Flow and Natural Lake Level Program, 2 CCR 408-2 ("ISF Rules").

**I. Statement of Position**

CWCB staff drafted amendments to the ISF Rules to implement provisions of House Bill 20-1157, update references to the CWCB website, and provide guidance to Colorado Parks and Wildlife. The Nature Conservancy supports the proposed amendments.

**II. Witness List**

A. Aaron Citron, Natural Resources Policy Advisor for The Nature Conservancy

Mr. Citron will testify in support of the CWCB Staff's proposed ISF Rules because they are consistent with the statutory language included in House Bill 20-1157 and specifically the rulemaking provisions now included at C.R.S. §37-83-105(3). The draft amended rules are appropriately limited to the review and acceptance of ISF loans made pursuant to C.R.S. §37-83-105. They provide the clear guidance necessary for the CWCB Board and Colorado Parks and Wildlife staff to implement the ISF loans program referenced above.

**III. Statement of Open Legal Questions**

The Nature Conservancy does not identify any open legal questions at this time. It reserves the opportunity to address open legal questions identified by other parties in its Rebuttal Statement.

**IV. Statement of Relief Requested**

The Nature Conservancy requests that the Board approve the amendments to the ISF Rules *in the same form as published and noticed*.

**V. Time Requested at the Hearing**

The Nature Conservancy requests 5 minutes for the presentation of Aaron Citron.

**VI. Exhibit List**

A. TNC-1 Resume of Aaron Citron

Respectively submitted this 10<sup>th</sup> day of December, 2020.

THE NATURE CONSERVANCY

A handwritten signature in black ink, appearing to read 'A. Citron', with a long horizontal stroke extending to the right.

---

Aaron Citron  
Natural Resources Policy Advisor  
The Nature Conservancy

2424 Spruce Street  
Boulder, CO 80302  
Phone: (520) 730-3421  
Email: [aaron.citron@tnc.org](mailto:aaron.citron@tnc.org)

## **CERTIFICATE OF SERVICE**

I hereby certify that I have duly served the copies of the foregoing **Prehearing Statement of the The Nature Conservancy** upon all parties herein by email, this 10th day of December, 2020, addressed as follows:

### **Hearing Officer**

Amy Beatie  
Deputy Attorney General  
Natural Resources & Environment Section  
Office of the Colorado Attorney General  
1300 Broadway, 7th Floor  
Denver, Colorado 80203  
720-508-6296  
Email: [Amy.Beatie@coag.gov](mailto:Amy.Beatie@coag.gov)

[Copy to: John.Watson@coag.gov](mailto:John.Watson@coag.gov)

### **Rulemaking Parties**

<u>Staff to the Colorado Water Conservation Board</u> Linda Bassi Colorado Water Conservation Board 1313 Sherman Street, Room 718 Denver, CO 80203 303-866-3441, ext. 3204 Email: <a href="mailto:linda.bassi@state.co.us">linda.bassi@state.co.us</a>	<u>The Nature Conservancy</u> Aaron Citron 2424 Spruce Street Boulder, CO 80302 520-730-3421 Email: <a href="mailto:aaron.citron@tnc.org">aaron.citron@tnc.org</a>
<u>Colorado Water Trust</u> Kate Ryan 3264 Larimer Street, Suite D Denver, CO 80205 720-570-2897 Email: <a href="mailto:kryan@coloradowatertrust.org">kryan@coloradowatertrust.org</a>	<u>City of Aurora</u> <i>Counsel:</i> John M. Dingess 3600 S. Yosemite Street, Suite 500 Denver, CO 80237 303-779-0200 Email: <a href="mailto:jdingess@hrodllaw.com">jdingess@hrodllaw.com</a> ; <a href="mailto:mail@hrodllaw.com">mail@hrodllaw.com</a>

	<p><i>Staff Contact:</i></p> <p>Erich Fowler  15151 E. Alameda Parkway, Suite 3600  Aurora, CO 80012  303-739-7467  Email: <a href="mailto:esfowler@auroragov.org">esfowler@auroragov.org</a></p>
<p><u>Mesa County, Colorado</u></p> <p>Amber Swasey  Mesa County Community Development  P.O. Box 20,000-5022  Grand Junction, CO 81502  970-244-1762  Email: <a href="mailto:amber.swasey@mesacounty.us">amber.swasey@mesacounty.us</a></p>	<p><u>Trout Unlimited</u></p> <p>Drew Peternell  Trout Unlimited  P.O. Box 4165  Eagle, CO 81631  303-20-3057  Email: <a href="mailto:drew.peternell@tu.org">drew.peternell@tu.org</a></p>
<p><u>Western Resource Advocates, Conservation Colorado, and the National Audubon Society</u></p> <p>John Cyran  2260 Baseline Road  Boulder, CO 80302  303-746-3802  Email: <a href="mailto:john.cyran@westernresources.org">john.cyran@westernresources.org</a></p>	<p><u>Colorado River Water Conservation District</u></p> <p>Peter C. Fleming  Jason V. Turne  Lorra Nichols  Colorado River Water Conservation District  P.O. Box 1120  Glenwood Springs, CO 81602  970-945-8522  Email: <a href="mailto:pfleming@crwcd.org">pfleming@crwcd.org</a>  <a href="mailto:jturner@crwcd.org">jturner@crwcd.org</a>  <a href="mailto:lnichols@crwcd.org">lnichols@crwcd.org</a></p>
<p><u>Colorado Parks and Wildlife</u></p> <p><i>Counsel:</i></p> <p>Elizabeth Joyce  1300 Broadway, 7th Floor  Denver, CO 80203  720-508-6761  Email: <a href="mailto:elizabeth.joyce@coag.gov">elizabeth.joyce@coag.gov</a></p> <p><i>Staff Contacts:</i></p> <p>Katie Birch  Rob Harris  6060 Broadway  Denver, CO 80216  303-291-7335  303-291-7550  Email: <a href="mailto:katie.birch@state.co.us">katie.birch@state.co.us</a>  <a href="mailto:robert.harris@state.co.us">robert.harris@state.co.us</a></p>	

/s/

A handwritten signature in black ink, consisting of a stylized 'A' followed by a horizontal line and a small flourish.



## AARON CITRON

2424 Spruce Street, Boulder, CO 80301 • (520) 730-3421 • aaron.citron@tnc.org

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### PROFESSIONAL EXPERIENCE

---

#### **The Nature Conservancy in Colorado, Boulder, CO**

*Natural Resources Policy Advisor, March 2016 – Present*

*Acting Director, External Affairs, September 2019 – Present*

*Interim Director, Sustainable Food and Water Program, April 2019 – September 2019*

- Develop and manage Colorado policy portfolio and engagement through legislative, administrative, and stakeholder projects with a focus on state water policy, forest health, and private lands conservation.
- Support Conservancy conservation staff to address barriers to project implementation by providing legal analysis and policy implementation at the State and Federal levels.
- Additional duties as Acting External Affairs Director:
  - Manage two direct reports and coordinate legislative engagement and strategy development across conservation programs.
  - Lead the Board Policy Committee and serve on the chapter's Conservation Management Team, Leadership Team, and strategic planning core team.
  - Direct chapter engagement in the implementation of Colorado's greenhouse gas emissions reduction standards legislation, including coordination with internal science team and external coalition partners.
  - Coordinate with United States Government Relations Staff to implement North America policy priorities with Colorado's federal delegation.
- Additional duties as Sustainable Food and Water Program Director:
  - Managed remote team of three to ensure completion of environmental water transactions and agricultural water efficiency improvement projects.
  - Acted as liaison between the Colorado Chapter, the Colorado River Program, and the North America Resilient Water Supply Priority Strategy Lead.

#### **Environmental Defense Fund/Environmental Defense Action Fund, Boulder, CO**

*Manager, Ecosystems Water Program, April 2015 – March 2016*

*Project Manager, Colorado River Project, April 2014 – April 2015*

*Policy Analyst, Colorado River Project, December 2011 – April 2014*

- Managed staff and led strategy development in the Colorado River and Water Programs.
- Evaluated and drafted legislation related to water efficiency, water rights, and water management.
- Built constituencies for legal and policy change related to water conservation, efficiency, and management.
- Performed legal analysis and research related to water markets, management strategies, and improved irrigation practices in the Western United States with a focus on Colorado and Arizona.

#### **Arizona Land and Water Trust, Tucson, AZ**

*Project Manager, October 2008 – December 2011*

- Managed the Trust's Desert Rivers Initiative to develop market-based programs to secure water for the environment.
- Conducted landowner and government outreach and served as liaison to local, state, and regional water planning processes.
- Completed real estate transactions for conservation including conservation easements and fee purchases and donations.
- Performed extensive grant writing to support the Trust's Land & Water program and general operation and outreach.
- Reviewed and drafted legal documents for transactional programs and government contracts.

## AARON CITRON

2424 Spruce Street, Boulder, CO 80301 • (520) 730-3421 • aaron.citron@tnc.org

---

### **Donau & Bolt, Tucson, AZ**

*Associate Attorney, January 2008 – October 2008*

- Performed legal research and composed motions and memoranda on criminal and civil issues in both State and Federal court.

### **EDUCATION**

---

#### **Juris Doctorate (May 2007)**

*University of Arizona, James E. Rogers College of Law, Tucson, AZ*

#### **Bachelor of Arts in History (May 2003)**

*Emory University, Atlanta, GA*

### **PUBLICATIONS**

---

Citron, A., *Balancing flexibility with certainty: Agricultural water sharing in a water-short future*, Paper presented at the American Bar Association 33<sup>rd</sup> Annual Water Law Conference, Denver, CO (2015).

Citron, A., *Working Rivers and Working Landscapes: Using Short-Term Water Use Agreements to Conserve Arizona's Riparian and Cultural Heritage*, *Arizona Journal of Environmental Law and Policy*, Vol. 1, No. 1 (2010).

Citron, A. and D. Garrick, *Benefiting Landowners and Desert Rivers: A Water Rights Handbook for Conservation Agreements in Arizona*, *Arizona Land and Water Trust* (2010)

Citron, A., *Incorporating Flexibility Into Conservation Easements*, *Udall Center Publications* (2008).

### **Board Memberships**

---

*Interbasin Compact Committee, Governor Appointee, February 2019 - Present*

*Colorado Water Congress, Board of Directors, August 2019 – Present*

*American Water Resources Association, Colorado Chapter, Member at Large, April 2017 – April 2019*

**BEFORE THE COLORADO WATER CONSERVATION BOARD  
DEPARTMENT OF NATURAL RESOURCES, STATE OF COLORADO**

---

**IN THE MATTER OF THE RULEMAKING HEARING TO REVISE RULES CONCERNING  
THE COLORADO INSTREAM FLOW AND NATURAL LAKE LEVEL PROGRAM, 2 CCR  
408-2**

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**PREHEARING STATEMENT OF TROUT UNLIMITED**

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Trout Unlimited (“TU”) hereby submits this Prehearing Statement in the Matter of the Rulemaking Hearing to Revise Rules Concerning the Colorado Instream Flow and Natural Lake Level Program, 2 CCR 408-2 (“ISF Rules”).

**I. Statement of Position**

Colorado Water Conservation Board (“CWCB”) staff have proposed amendments to the ISF Rules. The proposed amendments implement the provisions of House Bill 20-1157 and update references to the CWCB website and to Colorado Parks and Wildlife. TU supports the proposed amendments.

**II. Witness List**

Drew Peterzell, Legal Counsel and Director, Trout Unlimited Colorado Water Program. Mr. Peterzell will describe TU’s interest in the proposed rules and may present arguments in favor of the proposed rules or in rebuttal to arguments of other parties.

**III. Statement of Open Legal Questions**

TU does not identify any open legal questions, but TU reserves the right to respond to arguments or legal questions presented by other parties.

**IV. Statement of Relief Requested**

TU urges the CWCB to approve the amendments to the ISF Rules proposed by CWCB staff.

**V. Time Requested at Hearing**

TU requests five minutes of time at the hearing.

**VI. Exhibit List**

TU does not intend to present exhibits.

Respectively submitted this 10<sup>th</sup> day of December, 2020.

TROUT UNLIMITED

A handwritten signature in black ink, appearing to read "Drew Peternell", written over a horizontal line.

Drew Peternell  
Trout Unlimited  
Colorado Water Program Director

P.O. Box 4165  
Eagle, Colorado 81631  
Phone: (303) 204-3057  
Email: [drew.peternell@tu.org](mailto:drew.peternell@tu.org)

## **CERTIFICATE OF SERVICE**

I hereby certify that I have duly served the copies of the foregoing **Prehearing Statement of Trout Unlimited** upon all parties herein by electronic mail, this 10th day of December, 2020, addressed as follows:

### **Hearing Officer**

Amy Beatie  
Deputy Attorney General  
Natural Resources & Environment Section  
Office of the Colorado Attorney General  
1300 Broadway, 7th Floor  
Denver, Colorado 80203  
720-508-6296  
Email: [Amy.Beatie@coag.gov](mailto:Amy.Beatie@coag.gov)  
Copy to: [John.Watson@coag.gov](mailto:John.Watson@coag.gov)

### **Rulemaking Parties**

<u>Staff to the Colorado Water Conservation Board</u>  Linda Bassi Colorado Water Conservation Board 1313 Sherman Street, Room 718 Denver, CO 80203 303-866-3441, ext. 3204 Email: <a href="mailto:linda.bassi@state.co.us">linda.bassi@state.co.us</a>	<u>The Nature Conservancy</u>  Aaron Citron 2424 Spruce Street Boulder, CO 80302 520-730-3421 Email: <a href="mailto:aaron.citron@tnc.org">aaron.citron@tnc.org</a>
<u>Colorado Water Trust</u>  Kate Ryan 3264 Larimer Street, Suite D Denver, CO 80205 720-570-2897 Email: <a href="mailto:kryan@coloradowatertrust.org">kryan@coloradowatertrust.org</a>	<u>City of Aurora</u>  <i>Counsel:</i>  John M. Dingess 3600 S. Yosemite Street, Suite 500 Denver, CO 80237 303-779-0200 Email: <a href="mailto:jdingess@hrodllaw.com">jdingess@hrodllaw.com</a> ; <a href="mailto:mail@hrodllaw.com">mail@hrodllaw.com</a>

	<p><i>Staff Contact:</i></p> <p>Erich Fowler  15151 E. Alameda Parkway, Suite 3600  Aurora, CO 80012  303-739-7467  Email: <a href="mailto:esfowler@auroragov.org">esfowler@auroragov.org</a></p>
<p><u>Mesa County, Colorado</u></p> <p>Amber Swasey  Mesa County Community Development  P.O. Box 20,000-5022  Grand Junction, CO 81502  970-244-1762  Email: <a href="mailto:amber.swasey@mesacounty.us">amber.swasey@mesacounty.us</a></p>	<p><u>Trout Unlimited</u></p> <p>Drew Peternell  Trout Unlimited  P.O. Box 4165  Eagle, CO 81631  303-20-3057  Email: <a href="mailto:drew.peternell@tu.org">drew.peternell@tu.org</a></p>
<p><u>Western Resource Advocates, Conservation Colorado, and the National Audubon Society</u></p> <p>John Cyran  2260 Baseline Road  Boulder, CO 80302  303-746-3802  Email: <a href="mailto:john.cyran@westernresources.org">john.cyran@westernresources.org</a></p>	<p><u>Colorado River Water Conservation District</u></p> <p>Peter C. Fleming  Jason V. Turne  Lorra Nichols  Colorado River Water Conservation District  P.O. Box 1120  Glenwood Springs, CO 81602  970-945-8522  Email: <a href="mailto:pfleming@crwcd.org">pfleming@crwcd.org</a>  <a href="mailto:jturner@crwcd.org">jturner@crwcd.org</a>  <a href="mailto:lnichols@crwcd.org">lnichols@crwcd.org</a></p>
<p><u>Colorado Parks and Wildlife</u></p> <p><i>Counsel:</i></p> <p>Elizabeth Joyce  1300 Broadway, 7th Floor  Denver, CO 80203  720-508-6761  Email: <a href="mailto:elizabeth.joyce@coag.gov">elizabeth.joyce@coag.gov</a></p> <p><i>Staff Contacts:</i></p> <p>Katie Birch  Rob Harris  6060 Broadway  Denver, CO 80216  303-291-7335  303-291-7550  Email: <a href="mailto:katie.birch@state.co.us">katie.birch@state.co.us</a>  <a href="mailto:robert.harris@state.co.us">robert.harris@state.co.us</a></p>	

/s/ 

---

Drew Peternell

BEFORE THE COLORADO WATER  
CONSERVATION BOARD

1313 Sherman St, #718  
Denver, CO 80203

Amy Beatie, Hearing Officer  
[amy.beatie@coag.gov](mailto:amy.beatie@coag.gov)

**IN THE MATTER OF THE RULEMAKING  
CONCERNING THE COLORADO INSTREAM  
FLOW AND NATURAL LAKE LEVEL PROGRAM  
2 CCR 408-2 AND HOUSE BILL 20-1157**

*Attorneys for the City of Aurora, acting by and through  
its Utility Enterprise,*  
**HAMRE, RODRIGUEZ, OSTRANDER & DINGESS, P.C.**

Address: John M. Dingess, #12239  
3600 S. Yosemite Street, Suite 500  
Denver, Colorado 80237-1829  
Phone: (303) 779-0200  
FAX: (303) 779-3662  
E-mail: [mail@hrodllaw.com](mailto:mail@hrodllaw.com)  
[jdingess@hrodllaw.com](mailto:jdingess@hrodllaw.com)

**WITHDRAWAL OF PARTY STATUS  
BY THE CITY OF AURORA**

The City of Aurora, Colorado, acting by and through its Utility Enterprise (“Aurora”), through its undersigned legal counsel, hereby respectfully withdraws its request for Party Status in the above captioned Rulemaking Hearing before the Colorado Water Conservation Board (“CWCB”).

Aurora filed a request for Party Status on November 10, 2020. Since filing its request for Party Status, Aurora’s staff and counsel have been in contact with the CWCB staff and counsel about Aurora’s concerns regarding the subject rulemaking. As a result of its discussions with, and information provided by, the CWCB staff and counsel, Aurora has determined it may withdraw its request for Party Status at this time.



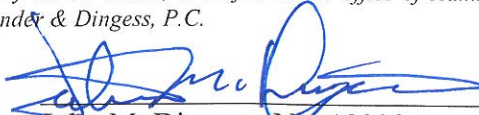
If any additional filings are deemed appropriate by the Hearing Officer in order for Aurora to effectuate its withdrawal of Party Status, such as the need to file a motion to withdraw, Aurora respectfully requests the Hearing Office so advise Aurora.

Respectfully submitted this 21<sup>st</sup> day of December 2020.

HAMRE, RODRIGUEZ, OSTRANDER  
& DINGESS, P.C.

*The physical copy of the original of this document, duly signed by the attorney named below, is on file at the office of Hamre, Rodriguez, Ostrander & Dingess, P.C.*

By:

  
John M. Dingess, No. 12239

## CERTIFICATE OF SERVICE

I hereby certify that on December 21<sup>st</sup>, 2020, a true and correct copy of the foregoing **WITHDRAWAL OF PARTY STATUS OF THE CITY OF AURORA** was served via email to the Hearing Officer and the Parties referenced below:

### Hearing Officer

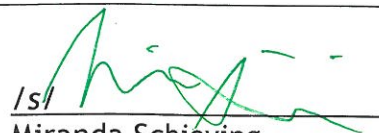
Amy Beatie  
Deputy Attorney General  
Natural Resources & Environment Section  
Office of the Colorado Attorney General  
1300 Broadway, 7th Floor  
Denver, Colorado 80203  
720-508-6295  
[amy.beatie@coag.gov](mailto:amy.beatie@coag.gov)

Copy To:  
[john.watson@coag.gov](mailto:john.watson@coag.gov)

### Parties

<u>Staff of the Colorado Water Conservation Board</u>  Linda Bassi Colorado Water Conservation Board 1313 Sherman Street, Room 718 Denver, CO 80203 303-866-3441 ext. 3204 <a href="mailto:linda.bassi@state.co.us">linda.bassi@state.co.us</a>	<u>Counsel for Staff of the Colorado Water Conservation Board</u>  Jen Mele Marc Sarmiento Allison Robinette Natural Resources & Environment Section Office of the Colorado Attorney General 1300 Broadway, 7th Floor Denver, CO 80203 720-508-6259 <a href="mailto:jennifer.mele@coag.gov">jennifer.mele@coag.gov</a> <a href="mailto:marc.sarmiento@coag.gov">marc.sarmiento@coag.gov</a> <a href="mailto:allison.robinette@coag.gov">allison.robinette@coag.gov</a>
<u>The Nature Conservancy</u>  Aaron Citron 2424 Spruce Street Boulder, CO 80302 520-730-3421 <a href="mailto:aaron.citron@tnc.org">aaron.citron@tnc.org</a>	<u>Colorado Water Trust</u>  Kate Ryan 3264 Larimer Street, Suite D Denver, CO 80205 720-570-2897 <a href="mailto:kryan@coloradowatertrust.org">kryan@coloradowatertrust.org</a>

	<u>Trout Unlimited</u>  Drew Peternell Trout Unlimited P.O. Box 4165 Eagle, Colorado 81631 303-204-3057 <a href="mailto:drew.peternell@tu.org">drew.peternell@tu.org</a>
<u>Western Resource Advocates, Conservation Colorado, and the National Audubon Society</u>  John Cyran 2260 Baseline Road Boulder, CO 80302 303-746-3802 <a href="mailto:john.cyran@westernresources.org">john.cyran@westernresources.org</a>	<u>Colorado River Water Conservation District</u>  Peter C. Fleming Jason V. Turner Lorra Nichols Colorado River Water Conservation District P.O. Box 1120 Glenwood Springs, Colorado 81602 970-945-8522 <a href="mailto:pfleming@crwcd.org">pfleming@crwcd.org</a> <a href="mailto:jturner@crwcd.org">jturner@crwcd.org</a> <a href="mailto:lnichols@crwcd.org">lnichols@crwcd.org</a>
<u>Colorado Parks and Wildlife</u>  <u>Staff Contacts:</u> Katie Birch Rob Harris 6060 Broadway Denver, CO 80216 303-291-7335 303-291-7550 <a href="mailto:katie.birch@state.co.us">katie.birch@state.co.us</a> <a href="mailto:robert.harris@state.co.us">robert.harris@state.co.us</a>  <u>Counsel:</u> Elizabeth Joyce 1300 Broadway Denver, CO 80203 720-508-6761 <a href="mailto:elizabeth.joyce@coag.gov">elizabeth.joyce@coag.gov</a>	

  
/s/ Miranda Schieving

## 18. Rebuttal Statements

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

---

**IN THE MATTER OF THE RULEMAKING HEARING TO REVISE RULES  
CONCERNING THE COLORADO INSTREAM FLOW AND NATURAL LAKE  
LEVEL PROGRAM, 2 CCR 408-2**

---

**REBUTTAL STATEMENT OF STAFF TO THE COLORADO WATER  
CONSERVATION BOARD**

---

Pursuant to the Hearing Officer's November 20, 2020 Order Re: Procedures and Deadlines for Prehearing Submissions, Staff to the Colorado Water Conservation Board ("CWCB Staff") submits the following Rebuttal Statement:

**A. Statement of Position**

CWCB Staff continues to recommend that the CWCB Board ("Board") adopt the rules as noticed and proposed on October 14, 2020 and published in the Colorado Register on October 25, 2020. These proposed rule amendments are consistent with the requirements of House Bill 20-1157 and existing instream flow rules, and will enable the proper implementation of section 37-83-105, C.R.S. (2020) regarding temporary loans of water for instream flow use. CWCB Staff maintains its position, as stated in CWCB Staff's December 10, 2020 Prehearing Statement, that any revisions besides the non-substantive corrections to an outdated website address and references to Colorado Parks and Wildlife, and revisions to Rules 6.k and 6.m to implement House Bill 20-1157 should be rejected by the Board as outside the scope of this rulemaking proceeding. *See* § 24-4-103(3) and (4)(c), C.R.S.

Furthermore, any water loaned to the CWCB under these rules retains the priority of the loaned water right, subject to terms and conditions imposed by the State Engineer to prevent injury, consistent with the rules as drafted.

## **B. Witness List**

In addition to the two witnesses listed in CWCB Staff's December 10, 2020 Prehearing Statement, CWCB Staff will make the following witness available for questions from the Board:

1. Division of Water Resources ("DWR") Representative, who is familiar with the review and approval process for loans of water. The DWR Representative may answer questions addressing: (1) the administration of instream flow water rights, acquired water, water rights, or interests in water, and loans of water for temporary instream flow use; and (2) DWR process and considerations when reviewing an application for a temporary loan of water.

## **C. Statement of Open Legal Questions**

Based upon the City of Aurora's withdrawal as a party from this rulemaking proceeding, there are no open legal questions.

## **D. Statement of Relief Requested**

All remaining parties support the adoption of the proposed rules. CWCB Staff requests that the Board adopt the rules as noticed, proposed, and published in the Colorado Register on October 25, 2020.

## **E. Desired Time**

CWCB Staff revises its time request to 60 minutes to present the proposed revisions to the rules, give any oral testimony, and present closing comments.

## **F. Exhibit List**

CWCB Staff maintains the exhibit list and exhibits submitted on December 10, 2020 and does not intend to introduce any other exhibits at the rulemaking hearing.

Dated this 5th day of January, 2021.

PHIL WEISER  
Attorney General

/s/ Jennifer Mele  
JEN MELE, #30720  
First Assistant Attorney General  
MARC SARMIENTO, #46322  
ALLISON ROBINETTE, #49930  
Assistant Attorneys General  
Natural Resources & Environment Section  
Attorneys for the Staff to the Colorado Water Conservation Board  
\*Counsel of Record

## **CERTIFICATE OF SERVICE**

I hereby certify that I have duly served the copies of the foregoing **Rebuttal Statement of the Staff to the Colorado Water Conservation Board** upon all parties herein by email, this 5th day of January, 2021, addressed as follows:

### **Hearing Officer**

Amy Beatie  
Deputy Attorney General  
Natural Resources & Environment Section  
Office of the Colorado Attorney General  
1300 Broadway, 7th Floor  
Denver, Colorado 80203  
720-508-6296  
Email: [Amy.Beatie@coag.gov](mailto:Amy.Beatie@coag.gov)  
  
Copy to: [john.watson@coag.gov](mailto:john.watson@coag.gov)

### **Rulemaking Parties**

<u>Staff to the Colorado Water Conservation Board</u>  Linda Bassi Colorado Water Conservation Board 1313 Sherman Street, Room 718 Denver, CO 80203 303-866-3441, ext. 3204 Email: <a href="mailto:linda.bassi@state.co.us">linda.bassi@state.co.us</a>	
<u>The Nature Conservancy</u>  Aaron Citron 2424 Spruce Street Boulder, CO 80302 520-730-3421 Email: <a href="mailto:aaron.citron@tnc.org">aaron.citron@tnc.org</a>	<u>Colorado Water Trust</u>  Kate Ryan 3264 Larimer Street, Suite D Denver, CO 80205 720-570-2897 Email: <a href="mailto:kryan@coloradowatertrust.org">kryan@coloradowatertrust.org</a>



<u>Trout Unlimited</u> Drew Peternell Trout Unlimited P.O. Box 4165 Eagle, CO 81631 303-204-3057 Email: <a href="mailto:drew.peternell@tu.org">drew.peternell@tu.org</a>	<u>Western Resource Advocates,  Conservation Colorado, and the  National Audubon Society</u>  John Cyran 2260 Baseline Road Boulder, CO 80302 303-746-3802 Email: <a href="mailto:john.cyran@westernresources.org">john.cyran@westernresources.org</a>
<u>Colorado River Water Conservation  District</u>  Peter C. Fleming Jason V. Turner Lorra Nichols Colorado River Water Conservation District P.O. Box 1120 Glenwood Springs, CO 81602 970-945-8522 Email: <a href="mailto:pfleming@crwcd.org">pfleming@crwcd.org</a> <a href="mailto:jturner@crwcd.org">jturner@crwcd.org</a> <a href="mailto:lnichols@crwcd.org">lnichols@crwcd.org</a>	<u>Colorado Parks and Wildlife</u>  <i>Staff Contacts:</i>  Katie Birch Rob Harris 6060 Broadway Denver, CO 80216 303-291-7335 303-291-7550 Email: <a href="mailto:katie.birch@state.co.us">katie.birch@state.co.us</a> <a href="mailto:robert.harris@state.co.us">robert.harris@state.co.us</a>  <i>Counsel:</i>  Elizabeth Joyce 1300 Broadway, 7th Floor Denver, CO 80203 720-508-6761 Email: <a href="mailto:elizabeth.joyce@coag.gov">elizabeth.joyce@coag.gov</a>

/s/ Margaret Popick

Margaret Popick

**BEFORE THE COLORADO WATER CONSERVATION BOARD  
DEPARTMENT OF NATURAL RESOURCES, STATE OF COLORADO**

---

**IN THE MATTER OF THE RULEMAKING HEARING FOR CONSIDERATION OF  
AMENDMENTS TO THE COLORADO WATER CONSERVATION BOARD'S RULES  
CONCERNING THE COLORADO INSTREAM FLOW AND NATURAL LAKE LEVEL  
PROGRAM, 2 CCR 408-2**

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**REBUTTAL STATEMENT OF THE COLORADO WATER TRUST**

---

The Colorado Water Trust hereby submits this Rebuttal Statement for the public rulemaking hearing to be held January 26, 2021 ("Rulemaking Hearing") before the Colorado Water Conservation Board for consideration of amendments to the Rules Concerning the Colorado Instream Flow and Natural Lake Level Program, 2 CCR 408-2 ("ISF Rules").

**I. Statement of Position**

**The Colorado Water Trust supports the proposed amendments to the ISF Rules as proposed and the positions of the other Parties to the Rulemaking Hearing.** The Colorado Water Trust disagreed with the arguments raised by the City of Aurora in its Prehearing Statement filed December 10, 2020. However, the City of Aurora withdrew its Party status on December 21, 2020. Accordingly, the arguments made by the City of Aurora are moot and Colorado Water Trust need not address the City of Aurora's Prehearing Statement. Herein, the Colorado Water Trust wishes only to reiterate its support of the proposed amendments to the ISF Rules and positions of the other Parties to the Rulemaking Hearing.

The Colorado Water Trust reserves the right to address testimony or exhibits of other Parties at the Rulemaking Hearing.

Respectively submitted this 5<sup>th</sup> day of January, 2021.

THE COLORADO WATER TRUST



Kate Ryan, Esq.

3264 Larimer Street, Suite D  
Denver, CO 80205  
Phone: (720) 570-2897  
Email: [kryan@coloradowatertrust.org](mailto:kryan@coloradowatertrust.org)

SENIOR STAFF ATTORNEY FOR THE  
COLORADO WATER TRUST

### **CERTIFICATE OF SERVICE**

I hereby certify that I have duly served true and correct copies of the foregoing **Rebuttal Statement of the Colorado Water Trust** upon the Hearing Officer and all Parties herein by email, this 5th day of January, 2021, addressed as follows:

#### **Hearing Officer**

Amy Beatie  
Deputy Attorney General  
Natural Resources & Environment Section  
Office of the Colorado Attorney General  
1300 Broadway, 7th Floor  
Denver, Colorado 80203  
720-508-6295  
[amy.beatie@coag.gov](mailto:amy.beatie@coag.gov)

Copy To:  
[john.watson@coag.gov](mailto:john.watson@coag.gov)

#### **Parties**

<u>Staff of the Colorado Water Conservation Board</u>  Linda Bassi Colorado Water Conservation Board 1313 Sherman Street, Room 718 Denver, CO 80203 303-866-3441 ext. 3204 <a href="mailto:linda.bassi@state.co.us">linda.bassi@state.co.us</a>	<u>Counsel for Staff of the Colorado Water Conservation Board</u>  Jen Mele Marc Sarmiento Allison Robinette Natural Resources & Environment Section Office of the Colorado Attorney General 1300 Broadway, 7th Floor Denver, CO 80203 720-508-6259 <a href="mailto:jennifer.mele@coag.gov">jennifer.mele@coag.gov</a> <a href="mailto:marc.sarmiento@coag.gov">marc.sarmiento@coag.gov</a> <a href="mailto:allison.robinette@coag.gov">allison.robinette@coag.gov</a>
<u>The Nature Conservancy</u>  Aaron Citron 2424 Spruce Street Boulder, CO 80302 520-730-3421 <a href="mailto:aaron.citron@tnc.org">aaron.citron@tnc.org</a>	<u>Colorado Water Trust</u>  Kate Ryan 3264 Larimer Street, Suite D Denver, CO 80205 720-570-2897 <a href="mailto:kryan@coloradowatertrust.org">kryan@coloradowatertrust.org</a>

<u>Trout Unlimited</u>  Drew Peternell Trout Unlimited P.O. Box 4165 Eagle, Colorado 81631 303-204-3057 <a href="mailto:drew.peternell@tu.org">drew.peternell@tu.org</a>	<u>Western Resource Advocates, Conservation Colorado, and the National Audubon Society</u>  John Cyran 2260 Baseline Road Boulder, CO 80302 303-746-3802 <a href="mailto:john.cyran@westernresources.org">john.cyran@westernresources.org</a>
<u>Colorado River Water Conservation District</u>  Peter C. Fleming Jason V. Turner Lorra Nichols Colorado River Water Conservation District P.O. Box 1120 Glenwood Springs, Colorado 81602 970-945-8522 <a href="mailto:pfleming@crwcd.org">pfleming@crwcd.org</a> <a href="mailto:jturner@crwcd.org">jturner@crwcd.org</a> <a href="mailto:lnichols@crwcd.org">lnichols@crwcd.org</a>	<u>Colorado Parks and Wildlife</u>  <u>Staff Contacts:</u> Katie Birch Rob Harris 6060 Broadway Denver, CO 80216 303-291-7335 303-291-7550 <a href="mailto:katie.birch@state.co.us">katie.birch@state.co.us</a> <a href="mailto:robert.harris@state.co.us">robert.harris@state.co.us</a>  <u>Counsel:</u> Elizabeth Joyce 1300 Broadway Denver, CO 80203 720-508-6761 <a href="mailto:elizabeth.joyce@coag.gov">elizabeth.joyce@coag.gov</a>

/s/ Kate Ryan

Kate Ryan

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

---

**IN THE MATTER OF REVISIONS TO COLORADO WATER CONSERVATION  
BOARD'S RULES CONCERNING THE COLORADO INSTREAM FLOW AND  
NATURAL LAKE LEVEL PROGRAM, 2 CCR 408-2**

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**REBUTTAL STATEMENT OF COLORADO PARKS AND WILDLIFE**

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Colorado Parks and Wildlife (CPW) submits this Rebuttal Statement in the Rulemaking Hearing to consider revisions to Colorado Water Conservation Board's Rules Concerning the Colorado Instream Flow and Natural Lake Level Program (Rules).

**I. Statement of CPW's Interest**

CPW is a party in this hearing to review the revisions to the Rules proposed by CWCB Staff (Staff) to the Colorado Water Conservation Board (Board), to review and respond to testimony submitted by other parties or public comment, as needed, and to ensure that any revisions adopted by the Board are consistent with section 37-83-105, C.R.S., and the intent of the Instream Flow (ISF) Program.

**II. Rebuttal Statement**

After reviewing the prehearing statements submitted into the record, CPW continues to support the Rule revisions proposed by Staff, as noticed on October 14, 2020, and published in the Colorado Register on October 25, 2020. The proposed Rule revisions are consistent with the requirements and direction of House Bill 20-1157, are within the scope of issues noticed in the Notice of Public Rulemaking, and will enable the proper implementation of section 37-83-105, C.R.S., regarding temporary loans of water for instream flow use.

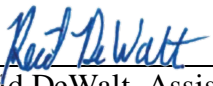
CPW files this Rebuttal Statement primarily to note that the City of Aurora filed a

withdrawal of its Request for Party Status on December 21, 2020, following discussions with CWCB Staff and counsel. Many of the suggestions proposed by Aurora in its Prehearing Statement were outside the scope of the noticed rulemaking, and would have had impacts to the ISF Program beyond implementing HB 20-1157. However, because the Hearing Officer confirmed Aurora's withdrawal in her January 4, 2021 Order, CPW believes no further response to Aurora's Prehearing Statement is necessary at this time.

All remaining Parties to this proceeding support the Rule revisions as proposed by Staff, and there are no identified open legal issues or alternate proposals pending before the Board. Accordingly, CPW respectfully requests that the Board adopt the Rule revisions proposed by Staff.

Submitted this 5<sup>th</sup> day of January, 2021.

**FOR COLORADO PARKS AND WILDLIFE**

  
\_\_\_\_\_  
Reid DeWalt, Assistant Director for Aquatics, Terrestrial &  
Natural Resources  
Colorado Parks and Wildlife  
6060 Broadway  
Denver, Colorado 80216

## **CERTIFICATE OF SERVICE**

I hereby certify that I have duly served the copies of the foregoing **Rebuttal Statement of Colorado Parks and Wildlife** upon all parties herein by email, this 5<sup>th</sup> day of January, 2021, addressed as follows:

### **Hearing Officer**

Amy Beatie  
Deputy Attorney General  
Natural Resources & Environment Section  
Office of the Colorado Attorney General  
1300 Broadway, 7th Floor  
Denver, Colorado 80203  
720-508-6296  
Email: [Amy.Beatie@coag.gov](mailto:Amy.Beatie@coag.gov)

Copy To:  
[john.watson@coag.gov](mailto:john.watson@coag.gov)

### **Rulemaking Parties**

<u>Staff of the Colorado Water Conservation Board</u>  Linda Bassi Colorado Water Conservation Board 1313 Sherman Street, Room 718 Denver, CO 80203 303-866-3441 ext. 3204 <a href="mailto:linda.bassi@state.co.us">linda.bassi@state.co.us</a>	<u>Counsel for Staff of the Colorado Water Conservation Board</u>  Jen Mele Marc Sarmiento Allison Robinette Natural Resources & Environment Section Office of the Colorado Attorney General 1300 Broadway, 7th Floor Denver, CO 80203 720-508-6259 <a href="mailto:jennifer.mele@coag.gov">jennifer.mele@coag.gov</a> <a href="mailto:marc.sarmiento@coag.gov">marc.sarmiento@coag.gov</a> <a href="mailto:allison.robinette@coag.gov">allison.robinette@coag.gov</a>
<u>The Nature Conservancy</u>  Aaron Citron 2424 Spruce Street Boulder, CO 80302 520-730-3421 <a href="mailto:aaron.citron@tnc.org">aaron.citron@tnc.org</a>	<u>Colorado Water Trust</u>  Kate Ryan 3264 Larimer Street, Suite D Denver, CO 80205 720-570-2897 <a href="mailto:kryan@coloradowatertrust.org">kryan@coloradowatertrust.org</a>

<u>Colorado River Water Conservation District</u>  Peter C. Fleming Jason V. Turner Lorra Nichols Colorado River Water Conservation District P.O. Box 1120 Glenwood Springs, Colorado 81602 970-945-8522 <a href="mailto:pfleming@crwcd.org">pfleming@crwcd.org</a> <a href="mailto:jturner@crwcd.org">jturner@crwcd.org</a> <a href="mailto:lnichols@crwcd.org">lnichols@crwcd.org</a>	<u>Trout Unlimited</u>  Drew Peternell Trout Unlimited P.O. Box 4165 Eagle, Colorado 81631 303-204-3057 <a href="mailto:drew.peternell@tu.org">drew.peternell@tu.org</a>
<u>Western Resource Advocates, Conservation Colorado, and the National Audubon Society</u>  John Cyran 2260 Baseline Road Boulder, CO 80302 303-746-3802 <a href="mailto:john.cyran@westernresources.org">john.cyran@westernresources.org</a>	

/s/ **Robert Harris** Digitally signed  
by Robert Harris  
Date: 2021.01.05  
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**BEFORE THE COLORADO WATER CONSERVATION BOARD  
DEPARTMENT OF NATURAL RESOURCES, STATE OF COLORADO**

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**IN THE MATTER OF THE RULEMAKING HEARING TO REVISE RULES CONCERNING THE  
COLORADO INSTREAM FLOW AND NATURAL LAKE LEVEL PROGRAM, 2 CCR 408-2**

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**REBUTTAL PREHEARING STATEMENT OF WESTERN RESOURCE ADVOCATES,  
CONSERVATION COLORADO, AND THE NATIONAL AUDUBON SOCIETY**

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Western Resource Advocates (“WRA”), Conservation Colorado (“CoCo”), and the National Audubon Society (“Audubon”) hereby jointly submit this Rebuttal Prehearing Statement for the Colorado Water Conservation Board’s rulemaking hearing (“Rulemaking”) concerning CWCB Staff’s proposed amendments to the CWCB’s Instream Flow Rules (the “ISF Rules”) implementing House Bill 20-1157.

**I. Introduction and Statement of Position**

**WRA, CoCo, and Audubon support the CWCB’s proposed amendments to the ISF Rules.**

The positions of WRA, CoCo, and Audubon remain as stated in their Prehearing Statement, submitted on December 20, 2020: As stated more specifically in their Prehearing Statement, WRA, CoCo, and Audubon support CWCB Staff’s proposed amendments to the ISF Rules pursuant to House Bill 20-1157, which specifically directs the CWCB to promulgate rules that will govern its review and acceptance of loans pursuant to § 37-83-105, as that statute was amended pursuant to HB 20-1157.

**II. Witness List**

Witnesses who will or may provide testimony on behalf of WRA, CoCo, and Audubon remain as stated in their Prehearing Statement. By this Rebuttal Prehearing Statement.

Josh Kuhn, Water Advocate, Conservation Colorado, **will call**.

Abby Burk, Western Rivers Regional Program Manager, Audubon Rockies, **may call**.

Mr. Kuhn and Conservation Colorado and Ms. Burk and Audubon participated in the drafting of House Bill 20-1157, the stakeholder outreach, and in other matters related to the General Assembly’s enactment of the Bill.

Mr. Kuhn shall and Ms. Burk may provide written testimony addressing these matters as well as Conservation Colorado and other proponents’ intent in drafting and supporting HB 20-1157.

**III. Statement of Open Legal Questions**

Following the withdrawal of the City of Aurora, WRA, CoCo, and Audubon believe there remain no open legal questions at issue in this Rulemaking. WRA, CoCo, and Audubon reserve the right to raise legal questions as such questions may arise in the course of this Rulemaking.

**IV. Statement of Relief Requested**

WRA, CoCo, and Audubon requests that the Board approve amendments to the ISF Rules substantively identical to Staff’s proposed amendments as published and noticed.

**V. Time Requested at Hearing**

WRA, CoCo, and Audubon request 5 minutes total time at the Rulemaking Hearing. This is a reduction in time from the 10 minutes requested in the Prehearing Statement and the 20 minutes requested at the Prehearing Conference.

## **VI. Exhibit List**

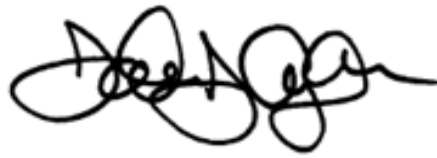
WRA, CoCo, and Audubon do not anticipate submitting any exhibits in this matter. WRA, CoCo, and Audubon reserve any right they may have to add exhibits if need arises in the course of this Rulemaking.

## **VII. Contact Person.**

For purposes of this rulemaking hearing only, John Cyran, Senior Staff Attorney for Western Resource Advocates, Healthy Rivers Program, remains the contact person for WRA, CoCo, and Audubon. The appropriate mailing address, phone number, and email address for Mr. Cyran are listed in the address block below.

Respectively submitted this 5<sup>th</sup> day of January 2021.

WESTERN RESOURCE ADVOCATES



---

John Cyran, #23144

2260 Baseline Road

Boulder, CO 80302

Phone: (303)746-3802

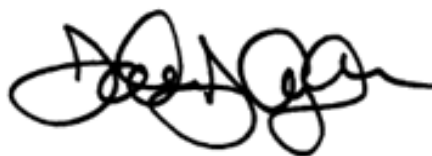
Email: [john.cyran@westernresources.org](mailto:john.cyran@westernresources.org)

Senior Staff Attorney, Healthy Rivers Program

On behalf of Western Resource Advocates, Conservation  
Colorado, and the National Audubon Society

## **CERTIFICATE OF SERVICE**

I hereby certify that I have duly served the copies of the foregoing **Rebuttal Prehearing Statement** upon all parties herein by email, this 5th day of January 2021, addressed as follows:



### **Hearing Officer**

Amy Beatie  
Deputy Attorney General  
Natural Resources & Environment  
Section Office of the Colorado  
Attorney General 1300 Broadway, 7th  
Floor  
Denver, Colorado 80203  
720-508-6296  
Email: [Amy.Beatie@coag.gov](mailto:Amy.Beatie@coag.gov)

[Copy to: John.Watson@coag.gov](mailto:John.Watson@coag.gov)

### **Rulemaking Parties**

<u>Staff to the Colorado Water Conservation Board</u> Linda Bassi Colorado Water Conservation Board 1313 Sherman Street, Room 718 Denver, CO 80203 303-866-3441, ext. 3204 Email: <a href="mailto:linda.bassi@state.co.us">linda.bassi@state.co.us</a>	<u>The Nature Conservancy</u> Aaron Citron 2424 Spruce Street Boulder, CO 80302 520-730-3421 Email: <a href="mailto:aaron.citron@tnc.org">aaron.citron@tnc.org</a>
<u>Colorado Water Trust</u> Kate Ryan 3264 Larimer Street, Suite D Denver, CO 80205 720-570-2897 Email: <a href="mailto:kryan@coloradowatertrust.org">kryan@coloradowatertrust.org</a>	

<u>Mesa County, Colorado</u> Amber Swasey Mesa County Community Development P.O. Box 20,000-5022 Grand Junction, CO 81502 970-244-1762 Email: <a href="mailto:amber.swasey@mesacounty.us">amber.swasey@mesacounty.us</a>	<u>Trout Unlimited</u> Drew Peternell Trout Unlimited P.O. Box 4165 Eagle, CO 81631 303-20-3057 Email: <a href="mailto:drew.peternell@tu.org">drew.peternell@tu.org</a>
<u>Western Resource Advocates, Conservation Colorado, and the National Audubon Society</u> John Cyran 2260 Baseline Road Boulder, CO 80302 303-746-3802 Email: <a href="mailto:john.cyran@westernresources.org">john.cyran@westernresources.org</a>	<u>Colorado River Water Conservation District</u> Peter C. Fleming Jason V. Turne Lorra Nichols Colorado River Water Conservation District P.O. Box 1120 Glenwood Springs, CO 81602 970-945-8522 Email: <a href="mailto:pfleming@crwcd.org">pfleming@crwcd.org</a> <a href="mailto:jturner@crwcd.org">jturner@crwcd.org</a> <a href="mailto:lnichols@crwcd.org">lnichols@crwcd.org</a>

## 19. Written Testimony

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

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**IN THE MATTER OF THE RULEMAKING HEARING TO REVISE RULES  
CONCERNING THE COLORADO INSTREAM FLOW AND NATURAL LAKE  
LEVEL PROGRAM, 2 CCR 408-2**

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**WRITTEN TESTIMONY OF STAFF TO THE COLORADO WATER  
CONSERVATION BOARD**

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Pursuant to the Hearing Officer's November 20, 2020 Order Re: Procedures and Deadlines for Prehearing Submissions, Staff to the Colorado Water Conservation Board ("Staff") submits the following testimony. Staff's witnesses are Linda Bassi and Kaylea White.

**A. Introduction**

In the 2020 legislative session, the General Assembly passed, and Governor Polis signed, House Bill 20-1157 ("HB 1157"), which became effective on September 14, 2020. HB 1157 amended section 37-83-105, C.R.S., which governs temporary loans of water for instream flow ("ISF") use. Relevantly, HB 1157 directed the Board to promulgate rules to implement provisions of the bill that apply to temporary loans of water for ISF use to improve the natural environment to a reasonable degree.

At the hearing set for January 26, 2021, Staff will ask the Board to adopt proposed revisions to the Rules Concerning the Colorado Instream Flow and Natural Lake Level Program ("ISF Rules") and the Rules' Statement of Basis and Purpose. The revisions address the requirements of HB 1157 and establish procedures to implement the bill, and make non-substantive updates to references to the CWCB

website and to Colorado Parks and Wildlife. The CWCB first adopted the ISF Rules in 1993, and has since amended those rules several times, most recently in 2009, to reflect changes in the law governing the ISF Program.

## **B. Background on this rulemaking process**

After the legislature adopted HB 1157, Staff and the Attorney General's Office coordinated on drafting revisions to the ISF Rules to reflect HB 1157's changes to section 37-83-105, C.R.S. Staff held two stakeholder meetings on the draft Rules in August 2020, received written comments on the draft Rules, and met with some interested parties in July, August, and September 2020. Staff revised the draft Rules in response to public input before providing the proposed Rules to the Board at its September 2020 meeting, when it authorized Staff to initiate the formal rulemaking process. The Notice of Proposed Rulemaking and proposed revised Rules were published in the Colorado Register on October 25, 2020.

Eight applications for party status were submitted to the Hearing Officer on or before the November 13, 2020 deadline. One party, Mesa County, did not submit a Prehearing Statement and is no longer a party to this proceeding. In their Prehearing Statements, every party, except the City of Aurora ("Aurora"), asked the Board to adopt the proposed revised Rules that were published in the Colorado Register. Staff and the Attorney General's Office met with representatives of Aurora on December 15, 2020 to discuss Aurora's comments on the proposed revisions to the Rules. The Hearing Officer held a prehearing conference on December 17, 2020. On December 21, 2020, Aurora withdrew its application for party status. Rebuttal

statements were timely filed by all parties except Trout Unlimited, The Nature Conservancy, and the Colorado River Water Conservation District.

### **C. The proposed revisions to the Rules**

Staff asks that the Board adopt the revised ISF Rules as noticed and published in the Colorado Register on October 25, 2020, and the proposed Statement of Basis and Purpose. See Exhibits CWCBStaff-5 and CWCBStaff-6 to CWCB Staff Prehearing Statement. The proposed revisions are consistent with the requirements of HB 1157 and the existing ISF Rules, and will enable the proper implementation of section 37-83-105, C.R.S. (2020) regarding temporary loans of water for ISF use. The proposed revisions update a reference to the CWCB's website and references to Colorado Parks and Wildlife, which is referred to as the Division of Wildlife in the existing ISF Rules, and revise Rules 6.k and 6.m to implement HB 1157.

The proposed revisions are as follows: **Rule 4c.** is revised to update the CWCB website address. **Rules 6f.(2); 7d.; 8i.(3)(f), (h), and (l)(iii); and 11c.** are revised to update references to Colorado Parks and Wildlife ("CPW").

**Rule 6k.** defines temporary (expedited and renewable) loans; describes allowable uses for each type of loan and time periods for which they may be exercised; and refers to the owner of a decreed water right who has offered water to the Board for a temporary loan as an "applicant." Rule 6k.(1) has been split into Rule 6k.(1) and 6k.(2) to address expedited and temporary loans separately. **Rule 6k.(1)** addresses expedited loans, describing: (a) the timing of the use of such loans; (b) the timing of the CWCB Director's response to an offer of an expedited loan of water for temporary ISF use, and the actions Staff will take in coordination with an applicant



to request approval from the State Engineer of an expedited loan, including preparing and submitting documentation and providing written notice as required by the statute; and (c) the Board's delegation of authority to the CWCB Director, provided that the State Engineer has determined that no injury will result from the expedited loan, to accept and execute an agreement for the expedited loan of water; and take any administrative action necessary to put the loaned water to ISF use.

**Rule 6k.(1)(d)** confirms that the CWCB's use of water under an expedited loan is subject to the CWCB's decreed instream flow rate(s), time period(s), and reach(es), and any conditions imposed by the State Engineer to prevent injury. **Rule 6k.(1)(e)** describes the timing of the Board's review and action on the CWCB Director's decision regarding an offer of an expedited loan, and clarifies that if the applicant objects to the Director's rejection of a loan offer, that decision will be brought to the Board. **Rule 6k.(1)(f)** directs the Board, Director, and Staff to expedite all actions necessary to implement expedited loans under Rule 6k.(1).

**Rule 6k.(2)** is a new provision that addresses renewable loans of water for temporary ISF use. **Rule 6k.(2)(a)** limits the amount of time renewable loans may be exercised and provides that 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. **Rules 6k.(2)(b) and (c)** identify the Board process in determining whether to direct Staff to proceed with a proposed renewable loan, and provide direction on how to request a hearing on a proposed renewable loan. **Rule 6k.(2)(d)**

sets forth actions the Board will take when considering a proposed renewable loan to improve the natural environment to a reasonable degree. **Rule 6k.(2)(e)** describes the types of water rights and operations the Board must consider when evaluating a proposed renewable loan for potential injury. **Rules 6k.(2)(f) and (g)** describe the actions Staff will take when Staff is directed to move forward with a proposed renewable loan, including coordinating with the applicant in preparing and submitting documentation, providing written notice as required by statute, executing an agreement for the loan (provided that the State Engineer determines no injury will result from the proposed loan), and taking any administrative action necessary to put the loaned water to ISF use. **Rule 6k.(2)(h)** provides that the CWCB's use of loaned water shall not extend beyond the subject decreed ISF 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. **Rule 6k.(2)(i)** provides that in each year that a renewable loan is exercised, the applicant, coordinating with Staff if necessary, shall provide the written notice required by statute. **Rule 6k.(2)(j)** sets forth the Board's process for considering public comment, and deciding whether to authorize Staff to coordinate with an applicant on applying for renewal of an existing renewable loan for an additional ten-year period, including preparing and submitting documentation and providing written notice, as required by statute.

**Rule 6k.(3)**, taken directly from HB 1157, provides that water rights loaned to the Board as 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 provided for in statute.

**Rule 6m.** is revised to exclude expedited and temporary loans from the process in ISF Rules 11a-11c, and to address the hearing process for renewable loans, which differs from the hearing process for other acquisitions of water for ISF use only regarding to whom and when notice of a hearing will be provided. **Rule 6m.(5)(d)** has been added and provides that at least thirty days prior to the hearing date, the Board shall provide written notice of a hearing on a proposed renewable loan, including the process and deadlines for participating in the hearing, to the applicant and to the recipients specified in section 37-83-105(2)(b)(II), C.R.S.

#### **D. Public comments and CWCB Staff's responses**

Due to space limitations, Staff paraphrases the public comments received on the proposed revisions to the ISF Rules. All written comments Staff received are posted on the CWCB website. In response to the City of Aurora's August 14, 2020 comments, Staff rejected language regarding additional factors for Board consideration to Rule 6e. because those factors were outside of the scope of rulemaking; however, Staff included "on a decreed instream flow reach" in Rule 6k., as requested by Aurora.

In a July 29, 2020 email, Jan Crawford asked Staff to consider economics associated with ISFs, citing economic benefits from recreation and tourism as reasons why the ISF Rules should make it easier, not harder, to keep water in streams. These comments did not request any changes to the proposed Rules.

In response to July 29, 2020 comments from Bill Wombacher on behalf of ACWWA, ECCV, United, and Legacy Water, Staff: (1) reinstated “or rejects” in Rule 6k.(1)(e); (2) rejected requested language to Rule 6k.(2)(g), after discussion with Mr. Wombacher; and (3) rejected requested language to Rule 6a. because such request was outside of the scope of the rulemaking.

In response to the Colorado Water Trust’s July 29, 2020 comments, Staff revised the first sentence of Rule 6k.(2)(h) to directly reflect language from HB 1157 regarding reapplication for up to two additional ten-year periods of a renewable loan.

Staff received comments dated July 29, 2020 from Rio Blanco County, the Rio Blanco Water Conservancy District, and the White River and Douglas Creek Conservation Districts (“County and Districts”) that contained overlapping comments. Because some of these comments pertained to ISF appropriations rather than temporary loans, Staff met with the County and Districts on August 24, 2020 to discuss those comments. One item discussed was their concerns about notice of ISF appropriations and proposed acquisitions, including temporary loans. Staff did not make any further revisions regarding notice of temporary loans as HB 1157 already provides for increased notice requirements, which are included in the proposed Rules. Staff will work with the County and Districts on ways to reach more stakeholders on proposed ISF appropriations.

Regarding the comments pertaining to the proposed Rules, Staff changed “may” to “shall” in Rule 6k.(2)(j) (“The Board shall consider any public comment and objections to the renewal provided at the public meeting.”), as requested. The County and Districts also requested including additional factors in Rule 6e., which is outside

of the scope of this rulemaking. The County and Districts suggested replacing “improve” with “sustain” in Rule 6k.(2)(d); Staff did not make this change because “improve” is a statutory term. The County and Districts requested the addition of “without detriment to existing rights or ability to develop decreed water rights” after all references to “to preserve and improve the natural environment to a reasonable degree.” Staff rejected that language because it is inconsistent with the legal standard applicable to temporary loans, which is that they “not injure decreed water rights, decreed exchanges of water, or other water users’ undecreed existing exchanges of water to the extent that the undecreed existing exchanges have been administratively approved before the date of the filing of the request for approval of the loan.” § 37-83-105(2)(b)(II.5), C.R.S. (2020).

In response to the Upper Yampa Water Conservancy District’s September 3, 2020 comments, Staff added “and will review any other biological or scientific evidence presented to the Board;” to Rule 6k.(2)(d)(i). Staff also added Rule 6k.(2)(h), as requested by the District, describing limits on the CWCB’s use of loaned water.

## **E. Conclusion**

Staff recommends that the Board adopt the amended ISF Rules as noticed and published in the Colorado Register on October 25, 2020, and the proposed Statement of Basis and Purpose.

Dated this 12th day of January, 2021.

## **CERTIFICATE OF SERVICE**

I hereby certify that I have duly served the copies of the foregoing **Written Testimony of the Staff to the Colorado Water Conservation Board** upon all parties herein by email, this 12th day of January, 2021, addressed as follows:

### **Hearing Officer**

Amy Beatie Deputy Attorney General Natural Resources & Environment Section Office of the Colorado Attorney General 1300 Broadway, 7th Floor Denver, Colorado 80203 720-508-6296 Email: <a href="mailto:Amy.Beatie@coag.gov">Amy.Beatie@coag.gov</a>  Copy to: <a href="mailto:john.watson@coag.gov">john.watson@coag.gov</a>
---

### **Rulemaking Parties**

<u>Staff to the Colorado Water Conservation Board</u>  Linda Bassi Colorado Water Conservation Board 1313 Sherman Street, Room 718 Denver, CO 80203 303-866-3441, ext. 3204 Email: <a href="mailto:linda.bassi@state.co.us">linda.bassi@state.co.us</a>	
<u>The Nature Conservancy</u>  Aaron Citron 2424 Spruce Street Boulder, CO 80302 520-730-3421 Email: <a href="mailto:aaron.citron@tnc.org">aaron.citron@tnc.org</a>	<u>Colorado Water Trust</u>  Kate Ryan 3264 Larimer Street, Suite D Denver, CO 80205 720-570-2897 Email: <a href="mailto:kryan@coloradowatertrust.org">kryan@coloradowatertrust.org</a>

<u>Trout Unlimited</u> Drew Peternell Trout Unlimited P.O. Box 4165 Eagle, CO 81631 303-204-3057 Email: <a href="mailto:drew.peternell@tu.org">drew.peternell@tu.org</a>	<u>Western Resource Advocates,  Conservation Colorado, and the  National Audubon Society</u> John Cyran 2260 Baseline Road Boulder, CO 80302 303-746-3802 Email: <a href="mailto:john.cyran@westernresources.org">john.cyran@westernresources.org</a>
<u>Colorado River Water Conservation  District</u> Peter C. Fleming Jason V. Turner Lorra Nichols Colorado River Water Conservation District P.O. Box 1120 Glenwood Springs, CO 81602 970-945-8522 Email: <a href="mailto:pfleming@crwcd.org">pfleming@crwcd.org</a> <a href="mailto:jturner@crwcd.org">jturner@crwcd.org</a> <a href="mailto:lnichols@crwcd.org">lnichols@crwcd.org</a>	<u>Colorado Parks and Wildlife</u> <i>Staff Contacts:</i> Katie Birch Rob Harris 6060 Broadway Denver, CO 80216 303-291-7335 303-291-7550 Email: <a href="mailto:katie.birch@state.co.us">katie.birch@state.co.us</a> <a href="mailto:robert.harris@state.co.us">robert.harris@state.co.us</a>  <i>Counsel:</i> Elizabeth Joyce 1300 Broadway, 7th Floor Denver, CO 80203 720-508-6761 Email: <a href="mailto:elizabeth.joyce@coag.gov">elizabeth.joyce@coag.gov</a>

/s/

Margaret Popick

**BEFORE THE COLORADO WATER CONSERVATION BOARD  
DEPARTMENT OF NATURAL RESOURCES, STATE OF COLORADO**

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**IN THE MATTER OF THE RULEMAKING HEARING FOR CONSIDERATION OF  
AMENDMENTS TO THE COLORADO WATER CONSERVATION BOARD'S RULES  
CONCERNING THE COLORADO INSTREAM FLOW AND NATURAL LAKE LEVEL  
PROGRAM, 2 CCR 408-2**

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**WRITTEN TESTIMONY OF THE COLORADO WATER TRUST**

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The Colorado Water Trust hereby submits this Written Testimony for the public rulemaking hearing to be held January 26, 2021 ("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 ("ISF Rules").

**I. Interest of the Colorado Water Trust in the ISF Rules**

The mission of the Colorado Water Trust is to restore flows to Colorado's rivers and streams in need. In its nearly 20-year history, the Colorado Water Trust has completed over 30 flow restoration projects across the state, many in partnership with the CWCB's ISF Program. Colorado Water Trust has significant experience developing and implementing ISF Loans collaboratively with the CWCB. Colorado Water Trust staff worked with water rights owners, partners, and staff at CWCB to pursue six separate ISF Loan approvals from the Colorado Division of Water Resources between 2012 and 2016. The ISF Rules will provide greater opportunities for us at the Colorado Water Trust to work with water users who want to engage in temporary streamflow restoration projects using their water rights. Exhibit 3 to the Prehearing Statement of the Colorado Water Trust filed in these proceedings on December 10, 2020, provides specific examples of how we will be able to use the enhanced ISF Loan Program in projects that are already underway.



## **II. Stakeholder Input and Education in Development of the ISF Rules**

The Colorado Water Trust appreciates the process undertaken by staff of the CWCB to propose ISF Rules that implement the directives of House Bill 20-1157 and that satisfy the concerns of stakeholders in the water community. The ISF Loan Program that House Bill 20-1157 enhanced is extremely important to us because it provides more opportunities for streamflow restoration. It is also very important to us that the water right owners with whom we collaborate on streamflow restoration projects remain confident that there is no risk to their own water use as a result of the ISF Loan Program. We at the Colorado Water Trust were actively engaged in stakeholder outreach when House Bill 20-1157 was legislated, attending meetings to provide water users with our experience using the existing program so that they could support the enhanced ISF loan program, and testifying to similar effect in legislative sessions. We have remained actively engaged throughout this rulemaking process, to ensure that the proposed ISF Rules will effectuate the legislation that we worked so hard to support. We are confident that the proposed ISF Rules will enable us to work on projects that implement temporary expedited loans of water to the CWCB to preserve the natural environment to a reasonable degree, and renewable loans of water to preserve and improve the natural environment to a reasonable degree.

We are also confident in the proposed ISF Rules because they are the result of robust outreach and deliberate drafting. CWCB Staff first circulated proposed ISF Rules in July 2020. The CWCB staff accepted and posted public comment on the CWCB website, including a request for modification submitted by the Colorado Water Trust. At an August meeting open to all members of the public, CWCB staff went over its proposed ISF Rules line by line. They discussed the comments received, and answered questions. CWCB circulated a second draft of proposed ISF Rules and held a second stakeholder meeting in August 2020. We felt like all of

our questions and concerns were fully addressed both orally at this meeting, as well as in specific changes that CWCB made to the proposed ISF Rules.

### **III. Safeguards Against Injury**

The Colorado Water Trust, CWCB, and partners who own water rights submitted six ISF Loan applications to the State Engineer between 2012 and 2016. The State Engineer approved each of these applications with terms and conditions to prevent injury to other water rights. The terms and conditions for each approval are specific to the loaned water right to ensure non-injury to other water right holders during implementation of the loan. In our experience, the terms and conditions for approval of various loans have addressed specific issues including:

- replacement of historic return flow obligations
- influence of sub-irrigation
- dry vs. average year consumptive use
- season of use
- measurement and accounting
- notice of operations to administrators, and
- verification of dry-up.

In addition, in past approvals, the State Engineer has maintained the ability to revoke or modify ISF Loan approvals should injury to other vested water rights occur or be expected to occur as a result of operation of an ISF Loan. The Proposed ISF Rules support the avoidance of injury by (1) requiring transparency in providing public access to all ISF Loan documentation provided to the State Engineer (Rules 6k.(1)(b)ii and 6k.(1)(f)ii); and (2) reiterating the statutory requirement for the State Engineer to make a determination of no injury pursuant to section 37-83-105(2)(a)(III) (Rules 6k.(1)(c) and 6k.(1)(g)).


The proposed ISF Rules will pave the way for ISF Loan Approvals that safeguard against injury to any water rights. The work of the Colorado Water Trust depends on executing streamflow restoration projects that operate productively and without injury, in order to attract collaboration with water users on Colorado's rivers in need. Accordingly, we rely on the demanding yet fair approval requirements facilitated by the ISF Rules and the State Engineer.

#### **IV. Conclusion**

**In summary, the Colorado Water Trust supports the amendments to the ISF Rules as proposed. We believe that the enhanced ISF Loan Program will benefit not only ISF water rights held by the CWCB on behalf of the people of Colorado, but also water right owners throughout the state.** The Colorado Water Trust reserves the right to address testimony or exhibits of other Parties at the Rulemaking Hearing.

Respectively submitted this 12<sup>th</sup> day of January, 2021.

THE COLORADO WATER TRUST

A handwritten signature in black ink, appearing to read 'Kate Ryan', is written over a horizontal line.

Kate Ryan, Esq.

3264 Larimer Street, Suite D  
Denver, CO 80205  
Phone: (720) 570-2897  
Email: [kryan@coloradowatertrust.org](mailto:kryan@coloradowatertrust.org)

SENIOR STAFF ATTORNEY FOR THE  
COLORADO WATER TRUST

## **CERTIFICATE OF SERVICE**

I hereby certify that I have duly served true and correct copies of the foregoing **Written Testimony of the Colorado Water Trust** upon the Hearing Officer and all Parties herein by email, this 12th day of January, 2021, addressed as follows:

### **Hearing Officer**

Amy Beatie  
Deputy Attorney General  
Natural Resources & Environment Section  
Office of the Colorado Attorney General  
1300 Broadway, 7th Floor  
Denver, Colorado 80203  
720-508-6295  
[amy.beatie@coag.gov](mailto:amy.beatie@coag.gov)

Copy To:  
[john.watson@coag.gov](mailto:john.watson@coag.gov)

### **Parties**

<u>Staff of the Colorado Water Conservation Board</u>  Linda Bassi Colorado Water Conservation Board 1313 Sherman Street, Room 718 Denver, CO 80203 303-866-3441 ext. 3204 <a href="mailto:linda.bassi@state.co.us">linda.bassi@state.co.us</a>	<u>Counsel for Staff of the Colorado Water Conservation Board</u>  Jen Mele Marc Sarmiento Allison Robinette Natural Resources & Environment Section Office of the Colorado Attorney General 1300 Broadway, 7th Floor Denver, CO 80203 720-508-6259 <a href="mailto:jennifer.mele@coag.gov">jennifer.mele@coag.gov</a> <a href="mailto:marc.sarmiento@coag.gov">marc.sarmiento@coag.gov</a> <a href="mailto:allison.robinette@coag.gov">allison.robinette@coag.gov</a>
<u>The Nature Conservancy</u>  Aaron Citron 2424 Spruce Street Boulder, CO 80302 520-730-3421 <a href="mailto:aaron.citron@tnc.org">aaron.citron@tnc.org</a>	<u>Colorado Water Trust</u>  Kate Ryan 3264 Larimer Street, Suite D Denver, CO 80205 720-570-2897 <a href="mailto:kryan@coloradowatertrust.org">kryan@coloradowatertrust.org</a>

<u>Trout Unlimited</u>  Drew Peternell Trout Unlimited P.O. Box 4165 Eagle, Colorado 81631 303-204-3057 <a href="mailto:drew.peternell@tu.org">drew.peternell@tu.org</a>	<u>Western Resource Advocates, Conservation Colorado, and the National Audubon Society</u>  John Cyran 2260 Baseline Road Boulder, CO 80302 303-746-3802 <a href="mailto:john.cyran@westernresources.org">john.cyran@westernresources.org</a>
<u>Colorado River Water Conservation District</u>  Peter C. Fleming Jason V. Turner Lorra Nichols Colorado River Water Conservation District P.O. Box 1120 Glenwood Springs, Colorado 81602 970-945-8522 <a href="mailto:pfleming@crwcd.org">pfleming@crwcd.org</a> <a href="mailto:jturner@crwcd.org">jturner@crwcd.org</a> <a href="mailto:lnichols@crwcd.org">lnichols@crwcd.org</a>	<u>Colorado Parks and Wildlife</u>  <u>Staff Contacts:</u> Katie Birch Rob Harris 6060 Broadway Denver, CO 80216 303-291-7335 303-291-7550 <a href="mailto:katie.birch@state.co.us">katie.birch@state.co.us</a> <a href="mailto:robert.harris@state.co.us">robert.harris@state.co.us</a>  <u>Counsel:</u> Elizabeth Joyce 1300 Broadway Denver, CO 80203 720-508-6761 <a href="mailto:elizabeth.joyce@coag.gov">elizabeth.joyce@coag.gov</a>

/s/ Kate Ryan

Kate Ryan

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

---

**IN THE MATTER OF REVISIONS TO COLORADO WATER CONSERVATION  
BOARD'S RULES CONCERNING THE COLORADO INSTREAM FLOW AND  
NATURAL LAKE LEVEL PROGRAM, 2 CCR 408-2**

---

**PRE-FILED WRITTEN TESTIMONY ON BEHALF OF COLORADO PARKS AND  
WILDLIFE**

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Colorado Parks and Wildlife (CPW) submits this Pre-filed Written Testimony in the rulemaking hearing to consider revisions to Colorado Water Conservation Board's Rules Concerning the Colorado Instream Flow and Natural Lake Level Program (Rules).

**I. Individuals Providing Testimony**

This pre-filed written testimony is prepared by Elizabeth Joyce on behalf of CPW. Ms. Joyce is an Assistant Attorney General employed by the Colorado Attorney General's Office, whose business address is 1300 Broadway, 7<sup>th</sup> Floor, Denver, Colorado 80203. At the Attorney General's Office, Ms. Joyce supports CPW's programs related to water resources, including CPW's role in CWCB's Instream Flow and Natural Lake Level Program (ISF Program), and CPW's efforts to participate in the ISF Program to benefit its own programs and aquatic and wildlife resources of the State of Colorado (State). Ms. Joyce will appear on behalf of CPW and present testimony at the rulemaking hearing.

Katie Birch, CPW Instream Flow Program Coordinator, and Robert Harris, CPW Water Resources Section Manager, will also be available at the rulemaking hearing to respond to any questions from the Board. Resumes for Ms. Birch and Mr. Harris were provided with CPW's Prehearing Statement.

## **II. Purpose of Testimony**

The purpose of this testimony is to provide CPW's position regarding the revisions to the Rules proposed by CWCB staff (Staff), as described in CPW's Amended Prehearing Statement, CPW's Rebuttal Statement, and as summarized herein. CPW does not have any additional exhibits to submit with its testimony.

## **III. Summary of Testimony**

CPW's testimony addresses the following points: 1) the proposed revisions to the Rules are necessary to implement House Bill (HB) 20-1157; 2) the proposed revisions will support expansion of the ISF loan program as required and allowed by HB 20-1157; and 3) CPW supports adoption of Staff's proposed revisions.

## **IV. Testimony Regarding the Proposed Rules**

### **A. CPW's Position on the Proposed Rules**

CPW supports Staff's proposed revisions to the Rules as attached to the Notice of Public Rulemaking dated October 14, 2020. CPW does not propose any additional modifications to the Rules.

### **B. CPW's Participation in the Instream Flow Program**

CPW has a close connection to CWCB's ISF Program. CPW works to provide CWCB Staff with biological expertise and recommendations regarding implementation of the ISF Program, as directed by sections 37-92-102(3) and 37-83-105, C.R.S. CPW also has its own policies and programs to perpetuate the fish, wildlife, and recreational resources of the State, which often benefit from implementation of the ISF Program. CPW has participated in the ISF Program in a variety of ways and has benefited from other participants' use of the legal tools allowed by the ISF Program, including use of water under the ISF loan program. For these reasons, CPW

seeks to ensure that any revisions adopted by the Board in this rulemaking are consistent with statute and the intent of the ISF Program.

#### C. The Revisions are Necessary to Implement HB 20-1157

During the 2020 session of the Colorado General Assembly, the legislature passed HB 20-1157, to amend several provisions of section 37-83-105, C.R.S., which authorizes the CWCB to accept temporary loans of water for instream flow use. As part of the ISF Program, the ISF loan program gives CWCB authority to accept temporary loans of water for instream flow purposes, and HB 20-1157 expanded certain aspects of the loan program. Staff initiated this rulemaking for the limited purpose to implement these statutory changes and to make a few clean-up edits where the Rules had become outdated.

#### D. Why CPW Supports the Proposed Revisions

The ISF loan program, when implemented appropriately to preserve or improve the natural environment to a reasonable degree, is an important mechanism that can advance CPW's mission to protect, preserve, enhance, and manage wildlife for the use, benefit, and enjoyment of the Coloradans and visitors to the State. CPW also believes that the intent of HB 20-1157 is to make the ISF loan program more flexible for interested water rights holders, while maintaining adequate protections for all water users within the stream system.

The proposed Rule revisions are consistent with the requirements and direction of House Bill 20-1157, are within the scope of issues noticed in the Notice of Public Rulemaking, and will enable the proper implementation of section 37-83-105, C.R.S., regarding temporary loans of water for instream flow use. Staff's proposed revisions to the Rules are narrowly tailored to implement changes enacted through HB 20-1157 while providing sufficient clarity and certainty to applicants and other water users as to how the provisions will be implemented and what



limitations and restrictions will apply for the protection of other water users. The proposed revisions distinguish the roles of the CWCB, CPW, and the State Engineer under the added provisions of HB 20-1157, which remain consistent with each entity's role under the prior ISF loan program and within the ISF Program more broadly. Finally, Staff's proposed revisions make needed changes to references to CWCB's website and CPW's name change following the agency's merger in 2011.

E. Why the Board should adopt Staff's proposed revisions

All Parties to this proceeding support the Rule revisions as proposed by Staff, and there are no other issues or concerns pending before the Board. Staff's proposed revisions do not go beyond those necessary to implement recent statutory and other changes, and are simply targeted at updating the Rules to continue implementing the ISF Program. For these reasons, CPW believes Staff's proposed revisions are necessary and will allow CWCB and participants to continue implementing the ISF Program, including the recent statutory expansion of the temporary loan program.

Submitted this 12<sup>th</sup> day of January, 2021.

PHILIP J. WEISER  
Attorney General

*/s/ Elizabeth M. Joyce*

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Elizabeth M. Joyce  
Parks Wildlife & Trust Lands Unit  
Natural Resources & Environment Section  
Colorado Department of Law  
*Attorneys for the Colorado Division of Parks and  
Wildlife*

## CERTIFICATE OF SERVICE

I hereby certify that on January 12, 2021 a true and correct copy of the foregoing **PRE-FILED WRITTEN TESTIMONY ON BEHALF OF COLORADO PARKS AND WILDLIFE** was served via email to the Hearing Officer and the Parties referenced below:

### Hearing Officer

Amy Beatie  
Deputy Attorney General  
Natural Resources & Environment Section  
Office of the Colorado Attorney General  
1300 Broadway, 7th Floor  
Denver, Colorado 80203  
720-508-6295  
[amy.beatie@coag.gov](mailto:amy.beatie@coag.gov)

Copy To:  
[john.watson@coag.gov](mailto:john.watson@coag.gov)

### Parties

<u>Staff of the Colorado Water Conservation Board</u>  Linda Bassi Colorado Water Conservation Board 1313 Sherman Street, Room 718 Denver, CO 80203 303-866-3441 ext. 3204 <a href="mailto:linda.bassi@state.co.us">linda.bassi@state.co.us</a>	<u>Counsel for Staff of the Colorado Water Conservation Board</u>  Jen Mele Marc Sarmiento Allison Robinette Natural Resources & Environment Section Office of the Colorado Attorney General 1300 Broadway, 7th Floor Denver, CO 80203 720-508-6259 <a href="mailto:jennifer.mele@coag.gov">jennifer.mele@coag.gov</a> <a href="mailto:marc.sarmiento@coag.gov">marc.sarmiento@coag.gov</a> <a href="mailto:allison.robinette@coag.gov">allison.robinette@coag.gov</a>
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<u>Trout Unlimited</u>  Drew Peternell Trout Unlimited P.O. Box 4165 Eagle, Colorado 81631 303-204-3057 <a href="mailto:drew.peternell@tu.org">drew.peternell@tu.org</a>	<u>Western Resource Advocates, Conservation Colorado, and the National Audubon Society</u>  John Cyran 2260 Baseline Road Boulder, CO 80302 303-746-3802 <a href="mailto:john.cyran@westernresources.org">john.cyran@westernresources.org</a>
<u>Colorado River Water Conservation District</u>  Peter C. Fleming Jason V. Turner Lorra Nichols Colorado River Water Conservation District P.O. Box 1120 Glenwood Springs, Colorado 81602 970-945-8522 <a href="mailto:pfleming@crwcd.org">pfleming@crwcd.org</a> <a href="mailto:jturner@crwcd.org">jturner@crwcd.org</a> <a href="mailto:lnichols@crwcd.org">lnichols@crwcd.org</a>	<u>Colorado Parks and Wildlife</u>  <u>Staff Contacts:</u> Katie Birch Rob Harris 6060 Broadway Denver, CO 80216 303-291-7335 303-291-7550 <a href="mailto:katie.birch@state.co.us">katie.birch@state.co.us</a> <a href="mailto:robert.harris@state.co.us">robert.harris@state.co.us</a>  <u>Counsel:</u> Elizabeth Joyce 1300 Broadway Denver, CO 80203 720-508-6761 <a href="mailto:elizabeth.joyce@coag.gov">elizabeth.joyce@coag.gov</a>

/s/ Elizabeth M. Joyce  
Elizabeth M. Joyce

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**WRITTEN TESTIMONY OF COLORADO RIVER WATER CONSERVATION DISTRICT**

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**PUBLIC RULEMAKING HEARING FOR CONSIDERATION OF AMENDMENTS TO RULES CONCERNING THE COLORADO INSTREAM FLOW AND NATURAL LAKE LEVEL PROGRAM (2-CCR 408-2 Rules)**

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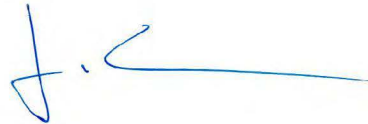
The following constitutes the written testimony of the Colorado River Water Conservation District:

1. The Colorado River Water Conservation District is a political subdivision of the State of Colorado formed by the Colorado Legislature (*See*, C.R.S. § 37-46-101, *et seq.*) in 1937 for the purpose of safeguarding that portion of the waters of the Colorado River apportioned to the state by interstate compact and of promoting the welfare of the inhabitants of the River District. Geographically, the River District encompasses an area of approximately 29,000 square miles, including all of twelve and parts of three western Colorado counties. Included in that area are the headwaters and tributaries of the Colorado River mainstem and its principal tributaries, the Gunnison, the White and the Yampa Rivers.
2. The general powers of the River District, set forth in C.R.S. § 37-46-107, *inter alia*, direct the River District to make surveys and investigations to ascertain the best method of utilizing stream flows within the River District and to make appropriations “for the use and benefit of the ultimate appropriators . . . .” This statute further directs the River District “to perform all acts and things necessary or advisable to secure and ensure an adequate supply of water, present and future, for irrigation, mining, manufacturing, and domestic purposes within said districts [*sic*].”

**CWCB Public ISF Rulemaking Hearing 2 CCR 408-2 Rules**  
**CRWCD Written Testimony**  
**Page 2**

3. Accordingly, the River District participated in the legislative process that lead to the passage of House Bill 20-1157.
4. The River District believes that the proposed amendments to the Instream Flow rules, as submitted by the staff of the Colorado Water Conservation Board, are consistent with the language of House Bill 20-1157.
5. In summary, the Colorado River Water Conservation District supports the adoption of the amendments to the Instream Flow rules as proposed.

Respectfully submitted on January 12, 2021.



---

Peter C. Fleming, General Counsel  
Jason V. Turner, Senior Counsel  
Colorado River Water Conservation District  
P.O. Box 1120  
Glenwood Springs, Colorado 81602  
Phone: (970) 945-8522  
Fax: (970) 945-8799  
E-mail: [pfleming@crwcd.org](mailto:pfleming@crwcd.org)  
[jturner@crwcd.org](mailto:jturner@crwcd.org)  
[lnichols@crwcd.org](mailto:lnichols@crwcd.org)

**CERTIFICATE OF SERVICE**

**IN THE MATTER OF THE RULEMAKING HEARING TO REVISE RULES CONCERNING THE COLORADO INSTREAM FLOW AND NATURAL LAKE LEVEL PROGRAM, 2 CCR 408-2**, I hereby certify that on January 12, 2021, a true and correct copy of the foregoing **WRITTEN TESTIMONY OF THE COLORADO RIVER WATER CONSERVATION DISTRICT** was served via email to the Parties as follows:

**HEARING OFFICER:**

Amy Beatie Deputy Attorney General  
Natural Resources & Environment Section  
Office of the Colorado Attorney General  
1300 Broadway, 7th Floor  
Denver, Colorado 80203  
720-508-6295  
[amy.beatie@coag.gov](mailto:amy.beatie@coag.gov)  
Copy To: [john.watson@coag.gov](mailto:john.watson@coag.gov)

**PARTIES:**

Staff of the Colorado Water Conservation Board  
Linda Bassi  
Colorado Water Conservation Board  
1313 Sherman Street, Room 718  
Denver, CO 80203  
303-866-3441 ext. 3204  
[linda.bassi@state.co.us](mailto:linda.bassi@state.co.us)

Counsel for Staff of the  
Colorado Water Conservation Board  
Jen Mele  
Marc Sarmiento  
Allison Robinette  
Natural Resources & Environment Section  
Office of the Colorado Attorney General  
1300 Broadway, 7th Floor  
Denver, CO 80203  
720-508-6259  
[jennifer.mele@coag.gov](mailto:jennifer.mele@coag.gov)  
[marc.sarmiento@coag.gov](mailto:marc.sarmiento@coag.gov)  
[allison.robinette@coag.gov](mailto:allison.robinette@coag.gov)

The Nature Conservancy  
Aaron Citron  
2424 Spruce Street  
Boulder, CO 80302  
520-730-342  
[aaron.citron@tnc.org](mailto:aaron.citron@tnc.org)

Colorado Parks and Wildlife  
Staff Contacts:  
Katie Birch  
Rob Harris  
6060 Broadway  
Denver, CO 80216  
303-291-7335  
303-291-7550  
[katie.birch@state.co.us](mailto:katie.birch@state.co.us)  
[robert.harris@state.co.us](mailto:robert.harris@state.co.us)

Counsel:  
Elizabeth Joyce  
1300 Broadway  
Denver, CO 80203  
720-508-6761  
[elizabeth.joyce@coag.gov](mailto:elizabeth.joyce@coag.gov)

Colorado Water Trust  
Kate Ryan  
3264 Larimer Street, Suite D  
Denver, CO 80205  
720-570-2897  
[kryan@coloradowatertrust.org](mailto:kryan@coloradowatertrust.org)

Trout Unlimited  
Drew Peternell  
P.O. Box 4165  
Eagle, Colorado 81631  
303-204-3057  
[drew.peternell@tu.org](mailto:drew.peternell@tu.org)

Western Resource Advocates  
Conservation Colorado  
National Audubon Society  
John Cyran  
2260 Baseline Road  
Boulder, CO 80302  
303-746-3802  
[john.cyran@westernresources.org](mailto:john.cyran@westernresources.org)

Lorra Nichols



**BEFORE THE COLORADO WATER CONSERVATION BOARD  
DEPARTMENT OF NATURAL RESOURCES, STATE OF COLORADO**

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**IN THE MATTER OF THE RULEMAKING HEARING TO REVISE RULES CONCERNING THE  
COLORADO INSTREAM FLOW AND NATURAL LAKE LEVEL PROGRAM, 2 CCR 408-2**

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**SUBMITTAL OF WRITTEN TESTIMONY OF JOSH KUHN BY WESTERN RESOURCE  
ADVOCATES, CONSERVATION COLORADO, AND THE NATIONAL AUDUBON SOCIETY**

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Western Resource Advocates (“WRA”), Conservation Colorado (“CoCo”), and the National Audubon Society (“Audubon”) hereby jointly submit this Written Testimony of Josh Kuhn for the Colorado Water Conservation Board’s rulemaking hearing (“Rulemaking”) concerning CWCB Staff’s proposed amendments to the CWCB’s Instream Flow Rules (the “ISF Rules”) implementing House Bill 20-1157.

I, Josh Kuhn, depose and state as follows:

As the Board is aware Colorado has been in drought conditions for nearly the entirety of the past 30 years. Colorado’s water resources are incurring stresses never before seen during human history and as policy makers the Board is faced with decisions that will determine the fate of all those dependent upon our State’s rivers: Do we continue with the status quo, or are we going to adapt to the best of our ability ensuring we create mechanisms protecting the natural environment for generations to come?

It is with this premise that, on behalf of our 60,000+ members, Conservation Colorado urges the Board to adopt strong and robust rules implementing House Bill 20-1157. Doing so will improve the CWCB’s Instream Flow Loan Program by increasing the availability of the program to water users seeking to lease their water while simultaneously allowing more water to remain in our rivers during times of drought and ensuring no other water users incur injury.

As previously stated, our State’s streams and rivers are facing unprecedented challenges from both increased demand as well as the effects of climate change. The year 2020 was the third driest on record with only 2002 and 2018 being drier. As of January 7, 2021, over 76% of the state was experiencing extreme to exceptional drought conditions (the latter of which is a new term describing a previously unclassified state of drought), which is resulting in record low flows throughout the state. For example, the Animas River flowing through Durango broke an all-time low flow record in late December with astonishingly low flow rate of 94 cubic feet per second.

The CWCB’s Instream Flow Program is one of our state’s most important conservation tools but its existing rules are quickly becoming outdated, preventing the program from being as useful as it needs to be during these unprecedented times. Specifically, existing limits on the amount of time water may be made available via a loan from willing users must be revised both to benefit such willing users and to ensure water is available to benefit the river reaches most in need as determined by Colorado Parks and Wildlife’s biological assessments.

Conservation Colorado helped craft HB20-1157 to allow for protections of rivers without putting other water rights at risk of injury. In 2018 the Yampa river experienced its first ever call, which sent shock waves throughout the Yampa River Basin. This event was among the impetus for developing a policy that creates greater flexibility and adaptability. Specifically, HB20-1157:

- Provides water users the opportunity to utilize a one-time only expedited loan for critical stream flow responses
- Provides a robust administrative comment and review process for renewable loans.

- Adjusts the amount of time a user can exercise a renewable loan from 3 years out of 10 to 5 years out of 10 years.
- Allows water right owners to renew participation in the program for up to two additional 10-year periods.
- Provides flexibility by removing the minimum water amount limit, and instead allows renewable loans to be made that *improve* the natural environment based on a biological and scientific water needs assessment conducted by Colorado Parks and Wildlife.

The bill's passage reflects a process that included a multi-year campaign, engagement of a dozen or more members of the Colorado Water Congress, and over a half dozen stakeholder meetings. Stakeholders involved in this process reflected a wide variety of interests, and included Aurora, Colorado Springs, Denver, Northern, the Colorado River Water Conservation District, Southwest Water Conservation District, Grand Valley Water Users, Ute Water Conservancy District, and the City of Greeley; as well as numerous members of the conservation community including The Colorado Water Trust, The Nature Conservancy, and Trout Unlimited. The State also participated in this stakeholder process, represented by staff from CWCB, CPW, DWR, and the Colorado Office of the Attorney General.

These meetings provided space for differences of opinions to be expressed and agreed upon solutions developed. Ultimately the process provided a bill that passed the legislature with bipartisan support.

We urge the Board to adopt rules that align with the intent behind this process and allow the Program greater flexibility toward protecting flows and all those dependent upon them.

I declare the above to be true and correct to the best of my knowledge.



---

Josh Kuhn

Respectively submitted this 5<sup>th</sup> day of January 2021.

Western Resource Advocates



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John Cyran, #23144

2260 Baseline Road

Boulder, CO 80302

Phone: (303)746-3802

Email: [john.cyran@westernresources.org](mailto:john.cyran@westernresources.org)

Senior Staff Attorney, Healthy Rivers Program

On behalf of Western Resource Advocates, Conservation  
Colorado, and the National Audubon Society



## **CERTIFICATE OF SERVICE**

I hereby certify that I have duly served the copies of the foregoing **Submittal of Written Testimony** upon all parties herein by email, this 12<sup>th</sup> day of January 2021, addressed as follows:



---

### **Hearing Officer**

Amy Beatie  
Deputy Attorney General  
Natural Resources & Environment  
Section Office of the Colorado  
Attorney General 1300 Broadway, 7th  
Floor  
Denver, Colorado 80203  
720-508-6296  
Email: [Amy.Beatie@coag.gov](mailto:Amy.Beatie@coag.gov)

[Copy to: John.Watson@coag.gov](#)

### **Rulemaking Parties**

<u>Staff to the Colorado Water Conservation Board</u> Linda Bassi Colorado Water Conservation Board 1313 Sherman Street, Room 718 Denver, CO 80203 303-866-3441, ext. 3204 Email: <a href="mailto:linda.bassi@state.co.us">linda.bassi@state.co.us</a>	<u>The Nature Conservancy</u> Aaron Citron 2424 Spruce Street Boulder, CO 80302 520-730-3421 Email: <a href="mailto:aaron.citron@tnc.org">aaron.citron@tnc.org</a>
<u>Colorado Water Trust</u> Kate Ryan 3264 Larimer Street, Suite D Denver, CO 80205 720-570-2897 Email: <a href="mailto:kryan@coloradowatertrust.org">kryan@coloradowatertrust.org</a>	..

<p><u>Mesa County,</u>  <u>Colorado</u> Amber  Swasey  Mesa County Community Development  P.O. Box 20,000-5022  Grand Junction, CO 81502  970-244-1762  Email: <a href="mailto:amber.swasey@mesacounty.us">amber.swasey@mesacounty.us</a></p>	<p><u>Trout Unlimited</u>  Drew Peternell  Trout Unlimited  P.O. Box 4165  Eagle, CO 81631  303-20-3057  Email: <a href="mailto:drew.peternell@tu.org">drew.peternell@tu.org</a></p>
<p><u>Western Resource Advocates, Conservation</u>  <u>Colorado, and the National Audubon Society</u>  John Cyran  2260 Baseline Road  Boulder, CO 80302  303-746-3802  Email: <a href="mailto:john.cyran@westernresources.org">john.cyran@westernresources.org</a></p>	<p><u>Colorado River Water Conservation</u>  <u>District</u> Peter C. Fleming  Jason V. Turne  Lorra Nichols  Colorado River Water Conservation District  P.O. Box 1120  Glenwood Springs, CO 81602  970-945-8522  Email: <a href="mailto:pfleming@crwcd.org">pfleming@crwcd.org</a>  <a href="mailto:jturner@crwcd.org">jturner@crwcd.org</a>  <a href="mailto:lnichols@crwcd.org">lnichols@crwcd.org</a></p>

**BEFORE THE COLORADO WATER CONSERVATION BOARD  
DEPARTMENT OF NATURAL RESOURCES, STATE OF COLORADO**

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**IN THE MATTER OF THE RULEMAKING HEARING TO REVISE RULES CONCERNING THE  
COLORADO INSTREAM FLOW AND NATURAL LAKE LEVEL PROGRAM, 2 CCR 408-2**

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**SUBMITTAL OF WRITTEN TESTIMONY OF AARON CITRON FOR THE NATURE  
CONSERVANCY**

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The Nature Conservancy (“TNC”) hereby submits this Written Testimony of Aaron Citron for the Colorado Water Conservation Board’s rulemaking hearing (“Rulemaking”) concerning CWCB Staff’s proposed amendments to the CWCB’s Instream Flow Rules (the “ISF Rules”) implementing House Bill 20-1157.

The Nature Conservancy is a non-profit conservation organization working in all 50 states and in more than 70 countries around the world to protect the lands and waters on which all life depends. Protecting and restoring flows in Colorado’s rivers and streams is among our highest conservation priorities. The protection and restoration of healthy rivers and watersheds is also a critical component of Colorado’s Water Plan. TNC strongly supports the CWCB’s instream flow program and the temporary instream flow program. We have participated in temporary instream flow loans in the past and work periodically with CWCB staff on issues related to flow enhancement. In 2018, TNC helped create the Yampa River Fund which provides grants to local organizations for riparian restoration, agricultural infrastructure projects, and storage releases to support the instream flow near the City of Steamboat Springs. The temporary instream flow program provided for under C.R.S. §37-83-105 has been the basis for these storage releases and, without statutory amendment, there was a risk that future releases under this authority would not be allowed.

TNC initially engaged in and supported House Bill 20-1157 and its predecessor, House Bill 19-1218, to ensure that the temporary instream flow tool could continue to be used to support the goals of the Yampa River Fund and in a range of other scenarios across Colorado. From the beginning, CWCB staff and representatives from the State Engineer’s Office provided technical support to ensure that this program, if amended, would be administrable and that other water users would be protected from injury. In addition, Aaron Citron co-led with Kathleen Curry a stakeholder process hosted by the Colorado Water Congress in the Summer of 2019 to discuss concerns raised when this legislative concept was first introduced during the 2019 legislative session. That process focused on a number of issues, including notice, transparency, and protection from injury. The stakeholder process was a success and the Colorado Water Congress, along with multiple other participants, actively supported the legislation in 2020 – which included detailed provisions regarding the proposed rulemaking. House Bill 20-1157 accomplished The Nature Conservancy’s goal of expanding the number of tools available to voluntarily improve flows in Colorado’s rivers and balanced this with notice and processes agreed upon by the stakeholder group to protect water rights from injury. The rules proposed by CWCB staff are consistent with this effort and clarify program implementation to further these goals. For these reasons, TNC supports the amendments to the ISF rules as proposed and would like to thank staff and the many stakeholders across the state who participated in the effort to draft and pass the underlying legislation with broad, bipartisan support during the 2020 legislative session.

Thank you for the opportunity to testify and I will be happy to answer any questions.

Respectively submitted this 12<sup>th</sup> day of January 2021.

THE NATURE CONSERVANCY

A handwritten signature in black ink, appearing to read 'A Citron', with a long horizontal stroke extending to the right.

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Aaron Citron

2424 Spruce Street  
Boulder, CO 80302  
Phone: (520)730-3421  
Email: [aaron.citron@tnc.org](mailto:aaron.citron@tnc.org)

Natural Resources Policy Advisor  
The Nature Conservancy, Colorado

## **CERTIFICATE OF SERVICE**

I hereby certify that I have duly served the copies of the foregoing **Rebuttal Prehearing Statement** upon all parties herein by email, this 12th day of January 2021, addressed as follows:



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### **Hearing Officer**

Amy Beatie  
Deputy Attorney General  
Natural Resources & Environment Section  
Office of the Colorado Attorney General  
1300 Broadway, 7th Floor  
Denver, Colorado 80203  
720-508-6295  
[amy.beatie@coag.gov](mailto:amy.beatie@coag.gov)

Copy To:  
[john.watson@coag.gov](mailto:john.watson@coag.gov)

### **Parties**

<u>Staff of the Colorado Water Conservation Board</u>  Linda Bassi Colorado Water Conservation Board 1313 Sherman Street, Room 718 Denver, CO 80203 303-866-3441 ext. 3204 <a href="mailto:linda.bassi@state.co.us">linda.bassi@state.co.us</a>	<u>Counsel for Staff of the Colorado Water Conservation Board</u>  Jen Mele Marc Sarmiento Allison Robinette Natural Resources & Environment Section Office of the Colorado Attorney General 1300 Broadway, 7th Floor Denver, CO 80203 720-508-6259 <a href="mailto:jennifer.mele@coag.gov">jennifer.mele@coag.gov</a> <a href="mailto:marc.sarmiento@coag.gov">marc.sarmiento@coag.gov</a> <a href="mailto:allison.robinette@coag.gov">allison.robinette@coag.gov</a>
<u>The Nature Conservancy</u>  Aaron Citron 2424 Spruce Street Boulder, CO 80302	<u>Colorado Water Trust</u>  Kate Ryan 3264 Larimer Street, Suite D Denver, CO 80205

520-730-3421 <a href="mailto:aaron.citron@tnc.org">aaron.citron@tnc.org</a>	720-570-2897 <a href="mailto:kryan@coloradowatertrust.org">kryan@coloradowatertrust.org</a>
<u>Trout Unlimited</u>  Drew Peternell Trout Unlimited P.O. Box 4165 Eagle, Colorado 81631 303-204-3057 <a href="mailto:drew.peternell@tu.org">drew.peternell@tu.org</a>	<u>Western Resource Advocates,  Conservation Colorado, and the National  Audubon Society</u>  John Cyran 2260 Baseline Road Boulder, CO 80302 303-746-3802 <a href="mailto:john.cyran@westernresources.org">john.cyran@westernresources.org</a>
<u>Colorado River Water Conservation  District</u>  Peter C. Fleming Jason V. Turner Lorra Nichols Colorado River Water Conservation District P.O. Box 1120 Glenwood Springs, Colorado 81602 970-945-8522 <a href="mailto:pfleming@crwcd.org">pfleming@crwcd.org</a> <a href="mailto:jturner@crwcd.org">jturner@crwcd.org</a> <a href="mailto:lnichols@crwcd.org">lnichols@crwcd.org</a>	<u>Colorado Parks and Wildlife</u>  <u>Staff Contacts:</u> Katie Birch Rob Harris 6060 Broadway Denver, CO 80216 303-291-7335 303-291-7550 <a href="mailto:katie.birch@state.co.us">katie.birch@state.co.us</a> <a href="mailto:robert.harris@state.co.us">robert.harris@state.co.us</a>  <u>Counsel:</u> Elizabeth Joyce 1300 Broadway Denver, CO 80203 720-508-6761 <a href="mailto:elizabeth.joyce@coag.gov">elizabeth.joyce@coag.gov</a>




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Aaron Citron

**BEFORE THE COLORADO WATER CONSERVATION BOARD  
DEPARTMENT OF NATURAL RESOURCES, STATE OF COLORADO**

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**IN THE MATTER OF THE RULEMAKING HEARING TO REVISE RULES  
CONCERNING THE COLORADO INSTREAM FLOW AND NATURAL LAKE  
LEVEL PROGRAM, 2 CCR 408-2**

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**TESTIMONY OF DREW PETERNELL, DIRECTOR OF TROUT UNLIMITED'S  
COLORADO WATER PROGRAM**

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Good morning Colorado Water Conservation Board members. My name is Drew Peternell. I am the director of the Colorado water program for Trout Unlimited. I appreciate the opportunity to provide this testimony.

Trout Unlimited is a national, non-profit fisheries conservation organization. Across the country, TU volunteers and staff work to protect and restore coldwater habitat for trout and salmon. Here in Colorado, my program focuses on assuring that rivers and streams have adequate habitat and adequate flow to sustain healthy fisheries.

TU strongly supports the CWCB's ISF program and the temporary ISF loan program, in particular. We have participated in temporary ISF loan projects on a couple of occasions. We see the temporary loan program as an opportunity to benefit the environment while giving water rights holders more freedom to choose what to do with their property rights without the costs of going to water court. Avoiding water court is a necessity for many of the farm and ranch families that we work with.

The temporary loan program has operated successfully for many years. Prior to the passage of House Bill 20-1157, however, there were some significant statutory limitations on the program. House Bill 20-1157 removes a number of those limitations, and we believe that with that, we will see the temporary loan program grow to broader application.

Your staff and the Attorney General's office have done an excellent job of drafting rules that implement House Bill 20-1157 and of explaining the substance of the rules to you. Rather than going into any detail regarding the proposed rules, I will limit myself to saying that we support the rules, we appreciate the effort that has gone into preparing them, and we urge the board to adopt them.

Thank you for your time. I would be happy to answer questions.

TROUT UNLIMITED



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Drew Peternell  
Trout Unlimited  
Colorado Water Program Director

P.O. Box 770450  
Steamboat Springs, Colorado 80477  
Phone: (303) 204-3057  
Email: [drew.peternell@tu.org](mailto:drew.peternell@tu.org)



## **CERTIFICATE OF SERVICE**

I hereby certify that i have duly served the copies of the foregoing **Testimony of Drew Peternell, Director of Trout Unlimited's Colorado Water Program** upon all parties herein by electronic mail, this 12th day of January, 2021, addressed as follows:

### **Hearing Officer**

<p>Amy Beatie Deputy Attorney General Natural Resources &amp; Environment Section Office of the Colorado Attorney General 1300 Broadway, 7th Floor Denver, Colorado 80203 720-508-6296 Email: <a href="mailto:Amy.Beatie@coag.gov">Amy.Beatie@coag.gov</a> Copy to: <a href="mailto:John.Watson@coag.gov">John.Watson@coag.gov</a></p>
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### **Rulemaking Parties**

<u>Staff to the Colorado Water Conservation Board</u> Linda Bassi Colorado Water Conservation Board 1313 Sherman Street, Room 718 Denver, CO 80203 303-866-3441, ext. 3204 Email: <a href="mailto:linda.bassi@state.co.us">linda.bassi@state.co.us</a>	<u>The Nature Conservancy</u> Aaron Citron 2424 Spruce Street Boulder, CO 80302 520-730-3421 Email: <a href="mailto:aaron.citron@tnc.org">aaron.citron@tnc.org</a>
<u>Colorado Water Trust</u> Kate Ryan 3264 Larimer Street, Suite D Denver, CO 80205 720-570-2897 Email: <a href="mailto:kryan@coloradowatertrust.org">kryan@coloradowatertrust.org</a>	
<u>Mesa County, Colorado</u> Amber Swasey Mesa County Community Development P.O. Box 20,000-5022 Grand Junction, CO 81502 970-244-1762 Email: <a href="mailto:amber.swasey@mesacounty.us">amber.swasey@mesacounty.us</a>	

<p><u>Western Resource Advocates, Conservation Colorado, and the National Audubon Society</u></p> <p>John Cyran 2260 Baseline Road Boulder, CO 80302 303-746-3802 Email: <a href="mailto:john.cyran@westernresources.org">john.cyran@westernresources.org</a></p>	<p><u>Colorado River Water Conservation District</u></p> <p>Peter C. Fleming Jason V. Turne Lorra Nichols Colorado River Water Conservation District P.O. Box 1120 Glenwood Springs, CO 81602 970-945-8522 Email: <a href="mailto:pfleming@crwcd.org">pfleming@crwcd.org</a> <a href="mailto:jturner@crwcd.org">jturner@crwcd.org</a> <a href="mailto:lnichols@crwcd.org">lnichols@crwcd.org</a></p>
<p><u>Colorado Parks and Wildlife</u></p> <p><i>Counsel:</i></p> <p>Elizabeth Joyce 1300 Broadway, 7th Floor Denver, CO 80203 720-508-6761 Email: <a href="mailto:elizabeth.joyce@coag.gov">elizabeth.joyce@coag.gov</a></p> <p><i>Staff Contacts:</i></p> <p>Katie Birch Rob Harris 6060 Broadway Denver, CO 80216 303-291-7335 303-291-7550 Email: <a href="mailto:katie.birch@state.co.us">katie.birch@state.co.us</a> <a href="mailto:robert.harris@state.co.us">robert.harris@state.co.us</a></p>	

/s/ 

Drew Peterneil