



COLORADO

Colorado Water Conservation Board

Department of Natural Resources

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TO: Colorado Water Conservation Board Members

FROM: Rob Viehl, Chief
Kaylea White, Senior Water Resource Specialist
Stream and Lake Protection Section

DATE: November 20-21, 2024

AGENDA ITEM: 7. Proposed Revisions to Rules Concerning the Colorado Instream Flow and Natural Lake Level Program, 2 CCR 408-2

This is an informational item with no Board action required.

Background

In connection with implementing the proposals of the Colorado River Drought Task Force, the General Assembly passed, and Governor Polis signed, Senate Bill 24-197 (SB 197), which has an effective date of August 7, 2024, and is attached to this memo. Section 2 of SB 197 amends section 37-83-105, C.R.S., which governs temporary loans of water for instream flow (ISF) use. Among other things, SB 197 directs the Board to promulgate rules, as applicable, for the CWCB's review and acceptance of loans of stored water for instream flow use. See page 3, section 2 of SB 197 attached to this memo. The CWCB staff is working with the Attorney General's Office on drafting revisions to Rule 6.k of the Rules Concerning the Colorado Instream Flow and Natural Lake Level Program (ISF Rules). The revisions to the ISF Rules will only include changes to Rule 6.k to address 37-83-105(1)(c) pertaining to loans of stored water. A short summary of the rulemaking process is set forth below.

1. The Rulemaking Process

a. Meetings with Stakeholders

Section 24-4-103, C.R.S. (2024) 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 will hold stakeholder meetings to discuss the draft ISF Rules revisions over the next few months. Staff anticipates holding at least one virtual state-wide stakeholder meeting in December and one in-person stakeholder meeting in conjunction with Colorado Water Congress in January. For each meeting, staff will provide notice to persons on the ISF Subscription Mailing list and will post notice on the CWCB website. Additionally, Staff will request the Colorado Water Congress to forward notices of the meetings to persons on the State Affairs Committee.



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. 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. 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. If the Board holds the rulemaking hearing in July 2025, it is likely that the rules would become effective in September 2025, depending on the timing of publication by the Secretary of State.

2. Proposed Revised Rules

The attached proposed revised ISF Rules modify ISF Rule 6k. to implement Section 2 of SB 197, and include:

- a. Definitions of expedited and renewable loans;
- b. Notice requirements for both types of loans;
- c. Procedure for evaluating, requesting approval, and making findings for both types of loans when the loan involves stored water releases for use in a stream reach in which the board does not hold a decreed instream flow water right.

Attachment:

Senate Bill 24-197



An Act

SENATE BILL 24-197

BY SENATOR(S) Roberts and Will, Bridges, Exum, Fields, Gardner, Gonzales, Hansen, Jaquez Lewis, Kirkmeyer, Lundeen, Marchman, Michaelson Jenet, Pelton B., Pelton R., Priola, Rich, Rodriguez, Simpson, Sullivan, Van Winkle, Winter F., Fenberg;
also REPRESENTATIVE(S) McCluskie and Catlin, Amabile, Bacon, Bird, Boesenecker, Bradley, Brown, Clifford, Daugherty, Duran, English, Epps, Frizell, Froelich, Hamrick, Hartsook, Hernandez, Holtorf, Jodeh, Joseph, Kipp, Lieder, Lindsay, Lindstedt, Lukens, Lynch, Mabrey, Marshall, Marvin, Mauro, McCormick, McLachlan, Ortiz, Pugliese, Rutinel, Sirota, Snyder, Soper, Story, Taggart, Titone, Valdez, Velasco, Vigil, Weinberg, Weissman, Willford, Winter T., Young.

CONCERNING MEASURES FOR THE CONSERVATION OF WATER IN THE STATE,
AND, IN CONNECTION THEREWITH, IMPLEMENTING THE PROPOSALS OF
THE COLORADO RIVER DROUGHT TASK FORCE.

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

SECTION 1. Legislative declaration. (1) The general assembly finds and declares that:

(a) Since 2000, the Colorado river basin, including the Colorado

river and its tributaries in Colorado, has experienced unprecedented drought conditions that have contributed to decreased water supplies;

(b) Climate change, drier conditions, and depleted snowpack may further reduce the water available in Colorado's surface streams for beneficial uses and threaten Colorado's significant interests in the Colorado river and its tributaries; and

(c) Dry hydrology continues to reduce water supplies across the western slope of Colorado and the Colorado river basin and threatens the security of available water resources.

(2) The general assembly further finds and declares that:

(a) Senate Bill 23-295, enacted in 2023, created the Colorado river drought task force and a sub-task force related to tribal matters and tasked those entities with proposing ideas and making recommendations to address drought in the Colorado river basin;

(b) From July 2023 to December 2023, the task force and the sub-task force met frequently across Colorado and, on December 15, 2023, published a report of the task force's and sub-task force's work, topics of discussion, and recommendations;

(c) In the report, the task force and the sub-task force made several recommendations and produced several narrative suggestions;

(d) Some of the recommendations and narrative suggestions do not require statutory changes, as they relate to funding or federal policy;

(e) In addition, some of the recommendations and narrative suggestions are being addressed in other legislation or efforts, such as the annual water projects bill required pursuant to section 37-60-122 (1)(b), Colorado Revised Statutes, and the long bill for the 2024-25 state fiscal year; and

(f) The protections provided to electric utility water rights in sections 4, 5, and 6 of this act are for the benefit of the entire Yampa river basin water resources, in particular during low-flow conditions that have resulted in the administration of a call on the Yampa river in recent years.

The nondiversion or nonuse will provide a benefit to all water use sectors, balancing multiple beneficial uses of water on the Yampa river system.

(3) The general assembly therefore determines that it is in the best interest of Colorado to adopt some of the recommendations and narrative suggestions of the Colorado river drought task force and sub-task force related to tribal matters in order to protect, promote, and bolster Colorado's stake in the Colorado river and its tributaries.

SECTION 2. In Colorado Revised Statutes, 37-83-105, **amend** (3) introductory portion; and **add** (1)(c) as follows:

37-83-105. Owner may loan agricultural water right - loans to Colorado water conservation board for instream flows - rules - definition. (1) (c) (I) NOTWITHSTANDING SUBSECTION (1)(b) OF THIS SECTION, AN OWNER OF A DECREED STORAGE WATER RIGHT, IN ADDITION TO LOANS MADE PURSUANT TO SUBSECTION (1)(b) OF THIS SECTION, MAY LOAN WATER TO THE COLORADO WATER CONSERVATION BOARD TO PRESERVE OR IMPROVE THE NATURAL ENVIRONMENT TO A REASONABLE DEGREE FOR A STREAM REACH FOR WHICH THE BOARD DOES NOT HOLD A DECREED INSTREAM FLOW WATER RIGHT, WHICH LOAN THE BOARD MAY ACCEPT IN ACCORDANCE WITH SECTION 37-92-102, THIS SECTION, AND ANY RULES ADOPTED PURSUANT TO SUBSECTION (3) OF THIS SECTION.

(II) AS USED IN THIS SUBSECTION (1)(c), "STORAGE" HAS THE MEANING SET FORTH IN SECTION 37-92-103.

(3) The Colorado water conservation board shall promulgate rules, AS APPLICABLE, regarding the following necessary steps for its review and acceptance of loans for instream flow use pursuant to ~~subsection (1)(b)(II)~~ SUBSECTIONS (1)(b)(II) AND (1)(c)(I) of this section:

SECTION 3. In Colorado Revised Statutes, 37-60-133, **amend** (1)(a) as follows:

37-60-133. Minimum criteria and guidelines for agricultural water protection programs. (1) (a) The board shall develop minimum criteria and guidelines for the establishment of an agricultural water protection program in EACH water division ~~1 or 2~~ pursuant to section 37-92-305 (19)(b)(IV)(B) to assure sufficient protection and monitoring of

agricultural water protection water rights pursuant to section 37-92-305 (19)(b)(III).

SECTION 4. In Colorado Revised Statutes, 37-92-103, **amend** (2)(a) and (2)(b)(VI); and **add** (2)(c) and (7.3) as follows:

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

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

(a) The land on which the water right has been historically applied is enrolled under a federal land conservation program; ~~or~~

(b) The nonuse of a water right by its owner is a result of participation in:

(VI) Any contract or agreement with the Colorado water conservation board that allows the board to use all or a part of a water right to preserve or improve the natural environment to a reasonable degree under section 37-92-102 (3); OR

(c) SUBJECT TO SECTION 37-92-305 (3)(f), DURING THE PERIOD BEGINNING JANUARY 1, 2020, AND ENDING DECEMBER 31, 2050, AN ELECTRIC UTILITY IN DIVISION 6 DECREASES USE OF A WATER RIGHT, OR DOES NOT USE A WATER RIGHT, IF THE ELECTRIC UTILITY HAS OWNED THE WATER RIGHT SINCE JANUARY 1, 2019.

(7.3) "ELECTRIC UTILITY" MEANS A QUALIFYING RETAIL UTILITY, AS DEFINED IN SECTION 40-2-125.5 (2)(c), OR A WHOLESALE GENERATION AND TRANSMISSION ELECTRIC COOPERATIVE SUBJECT TO SECTION 25-7-105 (1)(e)(VIII)(I).

SECTION 5. In Colorado Revised Statutes, 37-92-301, **add**

(4)(a)(I.5) as follows:

37-92-301. Administration and distribution of waters.

(4) (a) (I.5) IF AN APPLICATION DESCRIBED IN SUBSECTION (4)(a)(I) OF THIS SECTION FILED ON OR BEFORE DECEMBER 31, 2050, SEEKS A FINDING OF REASONABLE DILIGENCE FOR A CONDITIONAL WATER RIGHT THAT IS OWNED BY AN ELECTRIC UTILITY IN DIVISION 6 SINCE JANUARY 1, 2019, THE WATER JUDGE MAY CONSIDER THE FOLLOWING AS SUPPORTING EVIDENCE FOR A FINDING OF REASONABLE DILIGENCE:

(A) THE CONDITIONAL WATER RIGHT MAY BE USED TO SUPPORT A SPECIFIC PROJECT OR POTENTIAL FUTURE GENERATION TECHNOLOGIES OR CONCEPTS THAT HAVE THE POTENTIAL TO ADVANCE PROGRESS TOWARD COLORADO'S CLEAN ENERGY AND GREENHOUSE GAS EMISSION REDUCTION GOALS; AND

(B) THE ELECTRIC UTILITY HAS MADE EFFORTS TO DEVELOP THE WATER RIGHT WITH REASONABLE DILIGENCE, WHICH MAY INCLUDE EFFORTS MADE BY THE ELECTRIC UTILITY OR ANOTHER ENTITY IN THE ELECTRIC GENERATION AND DISTRIBUTION INDUSTRY OR A RELATED RESEARCH INDUSTRY TO INVESTIGATE THE TECHNICAL OR COMMERCIAL VIABILITY OF FUTURE GENERATION TECHNOLOGIES OR CONCEPTS THAT HAVE THE POTENTIAL TO ADVANCE PROGRESS TOWARD COLORADO'S CLEAN ENERGY AND GREENHOUSE GAS EMISSION REDUCTION GOALS.

SECTION 6. In Colorado Revised Statutes, 37-92-305, **amend** (3)(c)(I), (3)(c)(II)(D), (19)(a)(I), and (19)(c) introductory portion; and **add** (3)(c)(III) and (3)(f) as follows:

37-92-305. Standards with respect to rulings of the referee and decisions of the water judge - definitions. (3) (c) In determining the amount of historical consumptive use for a water right in division 1, 2, 3, 4, 5, or 6, the water judge shall not consider any decrease in use resulting from the following:

(I) The land on which the water from the water right has been historically applied is enrolled under a federal land conservation program;
or

(II) The nonuse or decrease in use of the water from the water right

by its owner for a maximum of five years in any consecutive ten-year period as a result of participation in:

(D) A water banking program as provided by law; OR

(III) SUBJECT TO SUBSECTION (3)(f) OF THIS SECTION, THE DECREASE IN USE OR NONUSE OF A WATER RIGHT OWNED BY AN ELECTRIC UTILITY IN DIVISION 6 SINCE JANUARY 1, 2019, THAT OCCURS DURING THE PERIOD BEGINNING JANUARY 1, 2019, AND ENDING DECEMBER 31, 2050; EXCEPT THAT ANY WATER RIGHT, OR PORTION OF A WATER RIGHT, THAT IS LEASED OR LOANED BY THE ELECTRIC UTILITY TO A THIRD PARTY IS NOT ENTITLED TO HISTORICAL CONSUMPTIVE USE PROTECTION PURSUANT TO THIS SECTION FOR THE PERIOD THAT THE WATER RIGHT, OR PORTION OF THE WATER RIGHT, IS SUBJECT TO THE LEASE OR LOAN.

(f) (I) TO QUALIFY FOR HISTORICAL CONSUMPTIVE USE PROTECTION PURSUANT TO SUBSECTION (3)(c)(III) OF THIS SECTION OR TO QUALIFY FOR THE EXCEPTION TO ABANDONMENT PURSUANT TO SECTION 37-92-103 (2)(c), AN ELECTRIC UTILITY THAT MANAGES ALL UNITS OF A GENERATING STATION IN DIVISION 6 SHALL, FOR ITSELF AND ON BEHALF OF THE OTHER OWNERS OF THE GENERATING STATION, FILE WITH THE DIVISION 6 WATER COURT AN APPLICATION SEEKING QUANTIFICATION OF THE HISTORICAL CONSUMPTIVE USE FOR THE ABSOLUTE DIRECT FLOW WATER RIGHTS SERVING THE GENERATING STATION. THE APPLICATION MUST BE FILED WITH THE DIVISION 6 WATER COURT WITHIN ONE YEAR AFTER THE DATE THAT THE FINAL UNIT OF THE GENERATING STATION IS TAKEN OFFLINE.

(II) THE APPLICATION DESCRIBED IN SUBSECTION (3)(f)(I) OF THIS SECTION IS A CLAIM FOR A DETERMINATION OF A WATER RIGHT, AND THE DIVISION 6 WATER COURT HAS JURISDICTION TO DETERMINE THE HISTORICAL CONSUMPTIVE USE FOR THE ABSOLUTE DIRECT FLOW WATER RIGHTS SERVING THE GENERATING STATION IN ACCORDANCE WITH THIS SECTION USING THE STANDARDS AND PROCEDURES SET FORTH IN SECTIONS 37-92-302, 37-92-303, AND 37-92-304 AND THIS SECTION, INCLUDING STANDARDS AND PROCEDURES RELATED TO NOTICE AND PARTICIPATION OF OPPOSERS; EXCEPT THAT A CHANGE OF WATER RIGHT IS NOT REQUIRED AS A PREREQUISITE FOR THE QUANTIFICATION OF THE HISTORICAL CONSUMPTIVE USE BY THE DIVISION 6 WATER COURT. IF THE DIVISION 6 WATER COURT ENTERS A DECREE QUANTIFYING THE HISTORICAL CONSUMPTIVE USE, SUBSECTION (3)(e) OF THIS SECTION APPLIES TO THE ABSOLUTE DIRECT FLOW WATER

RIGHTS.

(III) THE QUANTIFICATION OF THE HISTORICAL CONSUMPTIVE USE BY THE DIVISION 6 WATER COURT DESCRIBED IN THIS SUBSECTION (3)(f) MAY BE USED IN A PROCEEDING TO CHANGE THE WATER RIGHT IF AND ONLY IF THE WATER RIGHT SUBJECT TO THE CHANGE WILL NOT BE DIVERTED TO ANY LOCATION EAST OF THE CONTINENTAL DIVIDE OR SOLD FOR USE OUTSIDE OF THE STATE OF COLORADO.

(19) **Agricultural water protection - definitions.** (a) (I) After the state engineer's proposed rules promulgated under section 37-80-123 are reviewed and finalized pursuant to section 37-80-123 (1)(c) and after the Colorado water conservation board has finalized the criteria and guidelines developed pursuant to section 37-60-133, the owner of an absolute decreed irrigation water right ~~in water division 1 or 2~~ used for agricultural purposes may apply in water court to change the use of the water right to an agricultural water protection water right. ~~A water right decreed in water division 3, 4, 5, 6, or 7 is not eligible for a change in water right to an agricultural water protection water right.~~ As used in this section, an "agricultural water protection water right" means a water right decreed to allow the lease, loan, or trade of up to fifty percent of the water subject to the water right.

(c) As used in this subsection (19), an "eligible entity" means an entity ~~in water division 1 or 2~~ that:

SECTION 7. In Colorado Revised Statutes, 37-92-308, **amend** (12)(a) as follows:

37-92-308. Substitute water supply plans - special procedures for review - water adjudication cash fund - legislative declaration. (12) **Agricultural water protection.** (a) After a person has obtained a decreed agricultural water protection water right pursuant to section 37-92-305 (19), ~~which water right is available only in water division 1 or 2;~~ the person may apply for a substitute water supply plan pursuant to this subsection (12).

SECTION 8. In Colorado Revised Statutes, 37-60-106.3, **amend** (6)(c) as follows:

37-60-106.3. State water plan - legislative declaration - grant program. (6) Water plan implementation grant program. The board may approve grants pursuant to the following requirements:

(c) The board shall establish criteria that require matching funds of at least twenty-five percent; except that:

(I) The board may award grants in 2021 and 2022 with reduced matching fund requirements; AND

(II) IN THE CASE OF A GRANT TO THE UTE MOUNTAIN UTE TRIBE OR THE SOUTHERN UTE INDIAN TRIBE, INCLUDING ALL SUBDIVISIONS OR SUBSIDIARIES OF, AND BUSINESS ENTERPRISES WHOLLY OWNED BY, EITHER TRIBE, THE BOARD SHALL REDUCE OR WAIVE FUND MATCHING REQUIREMENTS.

SECTION 9. Act subject to petition - effective date. 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; 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 2024 and, in such case, will take effect on the date of the official declaration of the vote thereon by the governor.



Steve Fenberg
PRESIDENT OF
THE SENATE



Julie McCluskie
SPEAKER OF THE HOUSE
OF REPRESENTATIVES

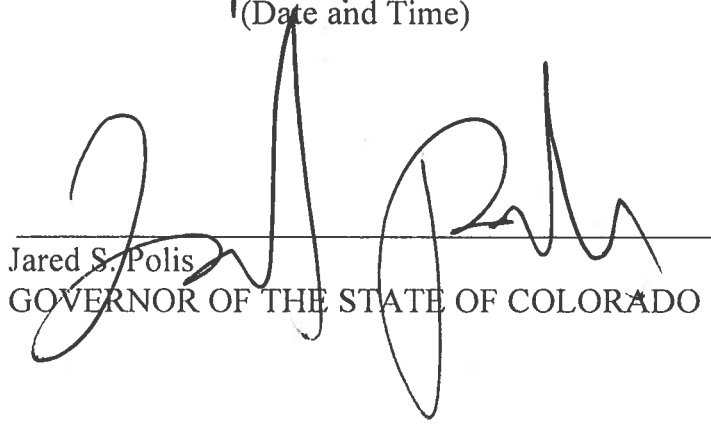


Cindi L. Markwell
SECRETARY OF
THE SENATE



Robin Jones
CHIEF CLERK OF THE HOUSE
OF REPRESENTATIVES

APPROVED Wednesday May 29th 2024 at 12:20 PM
(Date and Time)



Jared S. Polis

GOVERNOR OF THE STATE OF COLORADO