

POLICY NUMBER: 19

SUBJECT: **EXPENDITURES OF FUNDS FOR WATER ACQUISITIONS FOR INSTREAM FLOW USE PURSUANT TO SECTION 37-60-123.7, C.R.S.**

EFFECTIVE DATE: March 19, 2014

POLICY: The Colorado Water Conservation Board (“CWCB”) may expend funds provided under section 37-60-123.7, C.R.S. to pay for the costs of acquiring water, water rights and interests in water for instream flow (“ISF”) use. The primary priority for expenditures of these funds shall be the costs of water right acquisitions for existing or new ISF water rights to preserve or improve the natural environment to a reasonable degree. These funds also may be used in limited circumstances for the costs of water acquisitions to (1) preserve or improve the natural environment of species that have been listed as threatened or endangered under state or federal law, or are candidate species or likely to become candidate species; (2) support wild and scenic alternative management plans; or (3) provide federal regulatory certainty. The CWCB shall approve any expenditure of funds pursuant to section 37-60-123.7. The availability of such funds does not in any way alter the Board's commitment to the preservation of irrigated agriculture in Colorado.

The CWCB will consider recommendations from the CWCB staff for expenditures of funds to pay for the following types of costs related to acquiring water, water rights and interests in water for ISF use:

1. lease or purchase price of water, water rights or interests in water for ISF use;
2. costs of preliminary evaluations of the feasibility of a temporary or permanent transfer of a water right for ISF use;
3. costs of historical consumptive use analyses of water rights;
4. costs of water rights appraisals;
5. costs of water rights title searches;
6. costs related to negotiating and finalizing the agreement(s) necessary for the transaction;
7. costs related to obtaining a decreed right to use the water for ISF purposes; and
8. any other costs related to an acquisition of water for ISF use that the Board may deem appropriate.

When considering recommendations from the CWCB staff for expenditures of funds for water acquisitions to improve the natural environment to a reasonable degree, the CWCB shall consider the balance between consumptive and nonconsumptive needs and uses of water on the subject stream. When considering the acquisition of irrigation water rights,

the CWCB shall consider the potential impact to local agriculture of the proposed acquisition.

**PURPOSE:** To establish priorities and procedures for expenditures of funds under section 37-60-123.7 for the costs of acquiring water, water rights and interests in water for instream flow use.

**APPLICABILITY:** This policy and procedure applies to recommendations from the CWCB staff to the Board for expenditures of funds to pay the costs of acquiring water, water rights and interests in water for instream flow use under section 37-60-123.7.

**PROCEDURE:** 1. The CWCB staff will proceed under ISF Rule 6 in bringing proposed water acquisitions to the Board. When a proposed acquisition will involve the expenditure of funds under section 37-60-123.7, staff will prepare for the Board's consideration a summary of the financial aspects of the proposal, which will be part of the administrative record, including but not limited to:

- a. where applicable, the lease or purchase price of water, water rights or interests in water for ISF use, which, for a purchase of water, shall be supported by an appraisal or other appropriate valuation method;
- b. a breakdown of costs related to the proposal, such as
  - 1) costs of preliminary evaluations of the feasibility of a temporary or permanent transfer of a water right for ISF use;
  - 2) costs of historical consumptive use analyses of water rights;
  - 3) costs of water rights appraisals;
  - 4) costs of water rights title searches;
  - 5) costs related to negotiating and finalizing the agreement(s) necessary for the transaction; and
  - 6) costs related to obtaining a decreed right to use the water for ISF purposes.
- c. the amount of money staff is recommending that the Board spend on the proposal, and what costs the money will be applied to;
- d. the source of funds available to cover any remaining costs (for example, cost sharing by the water rights owner or any other individual or entity); and
- e. any in-kind services provided by the water rights owner or any other individual or entity.

In addition to the information listed above, staff also will bring all information required by ISF Rule 6 to the Board for its consideration, including, but not limited to, information related to the factors listed in ISF Rules 6e. and 6f.

2. When a proposed expenditure is for a water acquisition that, alone or in combination with other water acquisitions, will improve the natural environment to a reasonable degree, the CWCB staff, in coordination with

Colorado Parks and Wildlife staff, also will provide the following information:

- a. The degree to which the acquired water will add useable habitat to riffles, pools and runs within the subject ISF reach;
  - b. The amount of additional useable area for fish and macroinvertebrates that the acquired water will provide;
  - c. Where applicable, the amount of protection from high temperatures and low oxygen levels in hot summer months that the acquired water will provide;
  - d. An analysis of the degree to which the additional water resulting from the acquisition: (1) benefits the natural environment, and (2) does not result in hydraulic conditions that are detrimental to the aspects of the natural environment intended to be benefited by the acquired water, such as habitat requirements for a particular life stage of a fish species; and
  - e. Where applicable, an estimate of the degree to which the acquired water will increase moisture levels in the alluvial aquifer to support the riparian vegetation in the subject stream reach.
3. In the event that there is insufficient funding available for pending proposed expenditures, the CWCB staff will prioritize and recommend expenditures for water acquisitions in the following order:
- a. Permanent or temporary water acquisitions that preserve the natural environment of species that have been listed as threatened or endangered under state or federal law, or are candidate species or likely to become candidate species.
  - b. Permanent or temporary water acquisitions that supplement existing ISF water rights that are not always fully satisfied by existing stream flows.
  - c. Water acquisitions that facilitate the appropriation of new ISF water rights that are the minimum amount necessary to preserve the natural environment to a reasonable degree.
  - d. Permanent or temporary water acquisitions that improve the natural environment of species that have been listed as threatened or endangered under state or federal law, or are candidate species or likely to become candidate species.
  - e. Permanent or temporary water acquisitions that support wild and scenic alternative management plans.
  - f. Permanent or temporary water acquisitions that provide federal regulatory certainty.
  - g. Water acquisitions to improve the natural environment to a reasonable degree.

In general, water acquisitions that provide permanent protection will be given a higher priority than temporary acquisitions.

4. For leases of water, water rights or interests in water under section 37-92-102(3), the Board shall request an affidavit from the lessor stating the lessor's intended use of the water right during and after the term of the lease. The Board shall calculate the amount of compensation to be paid for the lease, and may increase or decrease that amount, based upon:
  - a. the lessor's stated intent as set forth in the affidavit and on the administrative record before the Board;
  - b. the fair market value of the subject water right;
  - c. the existence of one or more of the following circumstances:
    - (1) The lessor agrees in writing to put the water right back to its original decreed use after the term of the lease.
    - (2) The lessor agrees in writing to give the CWCB a right of first refusal on purchasing the water right at a fair market value if the lessor sells the water right after the term of the lease.
    - (3) The leased water will provide water to critical habitat for a species that has been listed as threatened or endangered under state or federal law, or is a candidate species or likely to become a candidate species.
    - (4) The positive or negative effects of public access, if any, to the ISF reach through which the Board will use the leased water.
    - (5) The historical consumptive use of the leased water could be used downstream of the ISF reach for compact compliance purposes.
    - (6) The lessor has entered into, or intends to enter into, an agreement for the lease of the historic consumptive use of the subject water right downstream of the ISF reach that would not have occurred but for the lease to the CWCB.
    - (7) The lessor or the CWCB will receive payment for leasing the historical consumptive use of the subject water right for use downstream of the ISF reach.
    - (8) The lessor has informed the Board that it intends to sell the subject water right after the term of the lease; and
  - d. any other pertinent information before the Board.

All lease agreements shall:

- a. require the lessor to supplement the above-referenced affidavit if the lessor's intent or actions regarding use of the water right during and after the term of the lease change during the term of the lease, including, but not limited to, lessor entering into an agreement for downstream use of the historic consumptive use of the leased water right, or a sale or subdivision of the land upon which the leased water historically has been used; and
- b. establish a mechanism for adjusting the compensation to the lessor based upon such supplementation and change(s).

NOTE: Recognizing that future needs and responses to those needs cannot be predicted with certainty, the Colorado Water Conservation Board reserves the right to expend funds for any water acquisition that it determines worthy of funding in accordance with applicable law.

Approved by the CWCB  
March 18-19, 2014 Board Meeting  
Agenda Item # 19