

## ISF LAW—STORIES ABOUT THE ORIGIN AND EVOLUTION OF COLORADO’S INSTREAM FLOW LAW IN THIS PRIOR APPROPRIATION STATE

BY LINDA J. BASSI, SUSAN J. SCHNEIDER, AND KAYLEA M.  
WHITE<sup>1</sup>

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1. Linda J. Bassi is the Chief of the Stream and Lake Protection Section of the Colorado Water Conservation Board. Susan J. Schneider was a prior First Assistant Attorney General of the Colorado Attorney General’s Water Conservation Unit. Kaylea M. White is Legal Protection and Acquisitions Specialist of the Stream and Lake Protection Section of the Colorado Water Conservation Board.

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## I. INTRODUCTION

“Further recognizing the need to correlate the activities of mankind with some reasonable preservation of the natural environment. . .the Colorado water conservation board is hereby vested with the authority. . .to appropriate, or acquire, such waters of natural stream and lakes. . .to preserve the natural environment to a reasonable degree. . .”<sup>2</sup>

It may not be as elegant and sweeping as “. . .untrammelled by man. . .retaining its primeval character. . .,”<sup>3</sup> or as protective of our “rich natural heritage. . .of esthetic, ecological, educational, recreational, and scientific value to our nation and its people. . .,”<sup>4</sup> yet it is still poetic. Like the Wilderness Act of 1964 and the Endangered Species Act of 1973, Colorado’s Instream Flow (“ISF”)<sup>5</sup> Act of 1973 expresses an ideal and tasks a public agency to bring about that ideal. Here, the ideal includes a balancing act for the Colorado Water Conservation Board (“CWCB”) to appropriate and acquire, on behalf of the people of the state of Colorado, water in natural streams and lakes to preserve the natural environment in sufficient quantity, in order to balance against the many diversions and uses of water for all other purposes, such as municipal, domestic, agricultural, recreational, commercial, industrial, and power generation, whether by direct flow use or after storage in small and large reservoirs. This is certainly an ambitious directive, and not without challenges. Part of the challenge is that the state’s ISF statute was enacted in 1973, more than 100 years after diversion rights had already begun lining up within Colorado’s prior appropriation system (with earliest priorities in the 1860’s), where “first-in-time” is “first-in-right.” Because the ISF rights were 100 years late in coming to the table, not only were these water rights assigned a very junior priority, but also, on many streams, the ISF water rights could only preserve an already diminished stream flow. Recognizing the issue, and in consideration of these limitations, the Colorado General Assembly also authorized the CWCB to acquire senior water rights for ISFs within the original 1973 ISF Act. In 2002, the General Assembly provided that those senior rights could be used not only to preserve, but also to improve the natural environment.

No funding was provided for such acquisitions for the first several decades, so CWCB had to rely on donations. Because of this lack of funding and other factors, the acquisition component of the ISF Program progressed more slowly than the appropriation component. In 2008, the General Assembly authorized

2. SB 73-97: Providing for the Appropriation of Water by the State of Colorado to Protect the Natural Environment, ch. 442, § 148-21-2, 148-21-3, 142-21-18, Colo. Session Laws 1521-22 (codified at § 37-92-102(3)).

3. Wilderness Act of 1964, Public Law 988-577 (16 USC 1131-1136).

4. Endangered Species Act of 1973, Public Law 93-205 (16 USC ch. 35 1531, *et seq.*).

5. This article often refers to “ISFs,” but also includes the protection of natural lake levels. For efficiency, natural lake levels may also be implicated in discussions only referencing “ISFs.”

an annual appropriation of \$1 million from the Construction Fund for the ISF acquisition program to help the program progress. Even so, partly because of the complexity of transactions that can include expensive and time-consuming water court litigation to change the acquired water rights' type of use, the ISF acquisition program still lags significantly behind the robust junior instream flow appropriation component of the ISF Program.

The CWCB is not without tools both to exercise its delegated authority and address challenges. Challenges and successes require creativity and energy at every turn, and since its inception, the CWCB ISF Program has not experienced a dull moment. Before jumping into the evolution of the law, we provide a brief summary of the Program as it stands today. Guided by a Board of Directors, who, by design, represent a cross-section of the geographic and political divides, the CWCB's four ISF program areas include: (1) new appropriations (requiring detailed analyses of recommendations, processing, and adjudications of new ISFs); (2) acquisitions (analyses, processing, and approvals of short-term, long-term, and permanent acquisitions of water rights and interests in water); (3) physical protection (stream gaging and requesting administration); and (4) legal protection (water court resume review, opposition, negotiation of decree terms, and litigation when needed).

From the first appropriations and acquisitions in the early 1970s to the present, the CWCB has appropriated and adjudicated 1,669 ISF water rights to preserve 9,599 miles of streams and 482 natural lake levels. The CWCB has acquired approximately 163 water rights within approximately 50 projects to preserve and improve over 756 miles of streams.<sup>6</sup> CWCB works closely with the Division of Water Resources on administration of its water rights within the priority system, using a real-time alert system tied to stream gages across the state. Currently, 242 alert stations monitoring stream flows at telemetered gages provide email alerts to staff.<sup>7</sup> Additional stream gaging needs are reviewed on an ongoing basis.

Over the years, as issues arose in the water rights community, various legal challenges rose to the Colorado Supreme Court level, and issues were brought to the legislature. As a result, the Colorado Supreme Court has decided cases that clarified the CWCB's authority on numerous occasions (at least once or twice a decade)<sup>8</sup>, and the General Assembly has clarified, modified, and at times expanded, the CWCB's authority (from once to several times a decade)<sup>9</sup> Under

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6. See CWCB database web site at <https://data.colorado.gov/Water/CWCB-Instream-Flow-and-Natural-Lake-Level-Data/kzxsx-aqy6>.

7. Information obtained from author's contact with CWCB staff, Robert Viehl, on March 26, 2019.

8. Supreme Court cases involving ISFs include: *Colo. River Water Conservation Dist. v. Colo. Water Conservation Bd.*, 594 P.2d 570 (Colo. 1979); *Bd. of County Commissioners for the County of Arapahoe v. E.C. Collard*, 827 P.2d 546 (Colo. 1992); *In the Matter of Upper Gunnison River Water Conservancy District*, 838 P.2d 840 (Colo. 1992); *Aspen Wilderness Workshop, Inc. v. Colo. Water Conservation Bd.*, 901 P.2d 1251 (Colo. 1995); *Colo. Water Conservation Bd. v. City of Central*, 125 P.3d 424 (Colo. 2005); *Colo. Water Conservation Bd. V. Farmers Water Development Co.*, 346 P.3d 52 (Colo. 2015); *St. Jude's Co. v. Roaring Fork Club, LLC*, 351 P.3d 442 (Colo. 2015).

9. The main legislative changes and clarifications to the ISF program include: Senate Bill 73-97 Original ISF Act; Senate Bill 81-414, which added protection for existing uses to section 37-92-102(3)(b) and the three determinations for ISF appropriations; Senate Bill 86-91 added

the direction of the CWCB's diverse Board of Directors, and with the support and counsel of the Attorney General's Natural Resources and Environment Section, CWCB staff has kept up with rule promulgations<sup>10</sup> and procedural adjustments in response to new laws as they are codified. As the challenges of balancing water distribution and the activities of mankind with some reasonable preservation of the natural environment continue to evolve, the ISF Program staff and Board of Directors will continue to evolve their approach with the times, making adjustments where and when needed.<sup>11</sup>

As stated by researchers Tom Cech and Bill McDonald, "much more research is needed to do justice to the role of the Colorado Water Conservation Board, its appointed and ex officio members, and its staff and advisors in the history of developing and protecting Colorado's water resources."<sup>12</sup> This paper is a review and summary of the historical highlights, assembled here to describe the evolution of instream flow law in Colorado. The paper is organized chronologically, written by a few of us who participated in much of it.

## II. THE SETTING

### A. AS A PRIOR APPROPRIATION STATE, COLORADO REQUIRED DIVERSIONS FOR ALL BENEFICIAL USES FROM THE 1800'S THROUGH THE 1960'S

Colorado's history shows that the gradual evolution from the traditional di-

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details on acquisitions and requests for federal recommendations; Senate Bill 87-212 reaffirmed the CWCB's exclusive authority to appropriate ISFs; Senate Bill 96-54 allowed Yampa basin conditional water rights to be converted to ISFs (repealed in 2000); Senate Bill 96-64 identified procedures Board must follow when decreasing ISF appropriations, clarified the water court's role in adjudicating ISFs, and confirmed the CWCB's authority to file changes or augmentation plans; House Bill 02-1438 repealed the CWCB's authority to convert conditional water rights to ISFs in the Yampa basin; Senate Bill 02-156 allowed for acquired ISF water rights to be used to improve the natural environment and prohibited the CWCB from acquiring water rights obtained by eminent domain and from modifying structures without owner approval; Senate Bill 03-1320 modified section 37-83-105(2) to allow temporary loans for ISFs for drought response; Senate Bill 05-1039 removed the drought requirement for temporary loans and limited such loans to 3 years out of a 10-year period; Senate Bill 07-1012 provided that temporary loans for ISFs would not result in a reduction of historical consumptive use ("HCU") calculations or abandonment claims; House Bill 08-1280 provided the same protections as SB 1012 for long-term loans for ISFs; House Bill 08-1346 funded an annual appropriation of \$1M for CWCB acquisitions to preserve the natural environment; Senate Bill 08-168 funded \$500K from the Species Conservation Trust Fund for ISF acquisitions to benefit endangered and threatened species; House Bill 09-1067 temporarily provided an income tax credit for donated water; Senate Bill 13-181 allowed funding to be used for acquisitions to preserve *and* to improve; and Senate Bill 18-170 provides ISF protection for environmental mitigation releases under certain circumstances.

10. The main changes and clarifications to the ISF Rules: In 1993, the original rules were promulgated to incorporate existing CWCB guidelines and meet updated laws; in 1994, the Statement of Basis and Purpose was amended; in 1999, Rule 5 was repealed and a new Rule 5 updated the CWCB's ISF procedures; in 2003, statutory changes from Senate Bill 02-156 were incorporated and the rules were re-ordered; in 2004, Rule 6.g implemented House Bill 03-1320; in 2005, Rule 6.i and 6.g implemented House Bill 05-1039; in 2009, Rule 8.e-h, and Rule 8.i were amended to include criteria from House Bill 08-1280.

11. See, e.g., *Colorado's Water Plan (2015)*.

12. Thomas V. Cech and J. William McDonald, *Defend and Develop, A brief History of the Colorado Water Conservation Board's First 75 Years*, (Wellstone Press 2012), p. 14..

version of water for consumptive uses to non-traditional, non-diversions of water for non-consumptive uses was a result of painstaking consideration by the Colorado Supreme Court and the General Assembly, as influenced by general support within Colorado and by federal protections for water and the environment. Eventually, the CWCB decided it needed to take the non-diversion issue to both the Colorado Supreme Court and the General Assembly, but the story behind that decision is an intricate one.

As a prior appropriation state, Colorado's constitution strictly regulated water uses by requiring diversions for such traditional uses as irrigation, mining, domestic, municipal or industrial. The right to maintain the flow of the stream was considered a riparian right and inconsistent with Colorado's strict doctrine of prior appropriation. Consistently, diversion requirements were instituted both legislatively and judicially. Article XVI, section 6, of the 1876 Colorado Constitution states: "[t]he right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied."<sup>13</sup> "The reason and thrust for this provision was to negate any thought that Colorado would follow the riparian doctrine in the acquisition and use of water."<sup>14</sup> Prior to Senate Bill 97 ("SB 97") in 1973, piscatorial and recreational uses were allowed as beneficial uses only when water was impounded.<sup>15</sup>

The first Colorado Supreme Court opinion regarding the diversion requirement was issued in 1883. The Colorado Supreme Court noted that it was not necessary to use a ditch to divert water as long as the water was being diverted for beneficial use by dams and "other contrivances."<sup>16</sup> Less than three years later, the Colorado Supreme Court upheld an appropriation of water by storage in the stream bed, provided that a diversion from the streambed would occur at a subsequent date.<sup>17</sup> In 1929, the court recognized two classes of appropriations for irrigation: one for ditches diverting water directly from the stream, and one for the storage of water to be used subsequently. This resulted in a general distinction between a direct flow water right measured by flow rate (usually in cfs), and a storage right measured by volume (usually in acre feet).<sup>18</sup> In 1938, the court held that the act of diversion and the act of applying the water diverted to a beneficial use are both necessary to constitute an appropriation.<sup>19</sup>

In 1962, the court reiterated that an appropriation requires diversion and beneficial use.<sup>20</sup> In 1963, the General Assembly provided for the right to divert water for storage as long as the water was impounded and put to future beneficial use.<sup>21</sup> In 1965, the court rejected the Colorado River Water Conservation District's claim of water in a "natural stream to maintain a constant stream flow in the amount necessary to preserve fish," holding that a diversion of water from

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13. Article XVI, section 6, of the 1876 Colorado Constitution.

14. *Colorado River Water Conservation Dist. v. Colorado Water Conservation Bd.*, 594 P.2d 570, 573 (Colo. 1979)

15. *In 2001, Senate Bill 01-216 allowed and regulated the use of recreational-in channel diversions ("RICDs") of water by in-channel structures.*

16. *Thomas v. Guiraud*, 6 Colo. 530, 533 (1883).

17. *Larimer Co. v. Luthe*, 8 Colo. 614, 9 P. 794 (1886).

18. *Handy Ditch Co. v. Greeley & Loveland Irr. Co.*, 280 P. 481, 481 (Colo. 1929).

19. *Bd. of County Comm'rs v. Rocky Mountain Water Co.*, 79 P.2d 373, 378 (1938).

20. *Denver v. Miller*, 368 P.2d 982, 984 (1962).

21. COLO. REV. STAT. § 148-9-1 (1963).

the stream is required because “the right to the maintenance of the ‘flow’ of the stream is a riparian right and is completely inconsistent with the doctrine of prior appropriation.”<sup>22</sup>

#### B. THE ‘69 ACT DID NOT ALTER THE DIVERSION REQUIREMENT

The General Assembly redefined Colorado water law with the 1969 Water Rights and Determination Act (“‘69 Act”), establishing seven water divisions comprised of the major watersheds, each with its own water court and division engineer, to govern the existing seventy water districts. In 1969, consistent with the court’s long-standing rulings on diversion, the General Assembly defined “appropriation” as “the diversion of a certain portion of waters of the state and the application of the same to a beneficial use.”<sup>23</sup> The legislature also provided that “beneficial use” includes “impoundment of water for recreational and piscatorial purposes.”<sup>24</sup> At the same time, the legislature defined “diversion” as “removing water from its natural course or location, or controlling water in its natural course or location, by means of a ditch, canal, flume, reservoir, bypass, pipeline, conduit, well, pump, or other structure or device.”<sup>25</sup> However, the General Assembly did not address environmental uses or instream flows in the ‘69 Act.

Thus, Colorado’s prior appropriation system maintained strict diversion requirements from the 1880s through the 1960s. It was not until the 1970s that Colorado began to seriously discuss the benefits of not depleting entire stream systems. As the environmental movement swept the nation, Colorado’s water professionals and the General Assembly recognized the multitude of benefits of keeping water in the stream through a Colorado state-managed program. Both directly and indirectly, the CWCB’s ISF water rights have not only helped to keep federal environmental efforts to control stream flow at bay, but also have helped support Colorado’s billion-dollar tourist and recreational economy, provided fish and wildlife habitat, helped reverse the trend toward species extinction, diluted effluent, and carried sediment that otherwise could cause erosion and flooding.<sup>26</sup>

The General Assembly granted the CWCB the authority to appropriate ISFs, to acquire ISFs, and specifically to file in water court for changes, exchanges, and augmentation plans, among the many other tasks the CWCB undertakes. With such broad grant of authority, the CWCB has struggled with, *inter alia*, determining how to proceed with water users’ requests for inundations of ISFs, whether to allow and how to address *de minimis* injury to ISFs, quantification of existing uses under section 37-92-102(3)(b), and how to balance in-

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22. Colorado River Water Conservation Dist. v. Rocky Mountain Power Co., 406 P.2d 798, 799 (Colo. 1965), citing Schodde v. Twin Falls Land and Water Co., 224 U.S. 107 (1912).

23. S.B. 81 (1969); COLO. REV. STAT. § 148-21-3 (1969).

24. Beneficial use definition, now codified at COLO. REV. STAT. § 37-92-103(??)

25. *Id.*; COLO. REV. STAT. § 37-92-103(7).

26. See Steven J. Shupe, “Colorado’s Instream Flow Program: Protecting Free-Flowing Streams in a Water Consumptive State” (1988); Instream Flow Protection in the Western United States: A Practical Symposium (March 31-April 1). <http://scholar.law.colorado.edu/instream-flow-protection-in-western-united-states/7>.

jury to ISFs with environmental mitigation by enacting rules on “injury with mitigation.” CWCB has promulgated rules around many of these exceptions as options and alternatives to a strict traditional interpretation of the prior appropriation system in relation to other competing water rights. In addition, the CWCB has defended lawsuits alleging that its ISF appropriations were unconstitutional, lawsuits alleging its rules and procedures were unconstitutional, and challenges to its authority to appropriate ISFs. Throughout the decades, the CWCB has promulgated rules to define and direct procedures for its appropriations and acquisitions, to follow the Colorado Supreme Court’s directions, and to provide guidance with transparency in its work with the water community. The legislative and judicial clarifications, and litigation challenges about these non-consumptive uses and the CWCB’s authority continue to this day.

### III. ENVIRONMENTALISM AND COMMON SENSE IN THE 1970’S

#### A. THE NATIONAL ENVIRONMENTAL MOVEMENT AND COLORADO WATER

The idea of protecting streams from complete depletion by diversion, storage, and consumptive uses in Colorado emerged gradually after both state-wide and national environmental forces eventually held sway. Federal and public concerns were heard over dry stream reaches and the fact that Colorado had no mechanism within the prior appropriation system to keep water in a stream for environmental preservation. People in Colorado began to recognize that allowing water to remain in the stream would also support Colorado’s recreational economy, provide fish and wildlife habitat, carry sediment that otherwise could cause erosion and flooding, and dilute effluent, which helps defray the local costs of treatment.<sup>27</sup> The national environmental movement had gained traction in the 1960s and 70s with Rachel Carson’s *Silent Spring* in 1962<sup>28</sup>, the Wilderness Act of 1964,<sup>29</sup> the Wild and Scenic Rivers Act of 1968,<sup>30</sup> Earth Day in 1970,<sup>31</sup> and also the National Environmental Protection Act of 1970 (“NEPA”),<sup>32</sup> establishing the Environmental Protection Agency (“EPA”), and the NEPA process for federal project review in 1970, the Clean Water Act of 1972,<sup>33</sup> the Endangered Species Act of 1973<sup>34</sup> (“ESA”), and the Safe Drinking

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27. *Id.*

28. Rachel Carson, *Silent Spring* (1962).

29. Wilderness Act of 1964, Public Law 988-577 (16 USC 1131-1136).

30. Wild and Scenic Rivers Act of 1968, Public Law 90-542 (16 USC 1271-1287).

31. Earth Day is an annual event created to celebrate the planet’s environment and raise public awareness about pollution, which started as a grassroots movement after Gaylord Nelson, then a U.S. Senator from Wisconsin witnessed the ravages of the 1969 massive oil spill in Santa Barbara, California. On April 22, 1970, 20 million Americans took to the streets, parks, and auditoriums to demonstrate for a healthy, sustainable environment in massive coast-to-coast rallies. Earth Day created public support for the creation of the EPA and contributed to the passage of the Clean Air Act, the Water Quality Improvement Act, the Endangered Species Act and several other environmental laws. See “The History of Earth Day” see <https://www.earth-day.org/about/the-history-of-earth-day/>.

32. National Environmental Protection Act of 1970, Public Law 91-190 (42 USC 4321 *et seq.*).

33. Clean Water Act of 1972, Public Law 92-500 (33 USC 1251-1397).

34. Endangered Species Act of 1973, Public Law 93-205 (16 USC ch. 35 1531 *et seq.*).



Water Act of 1974.<sup>35</sup>

The ESA provided protection to threatened and endangered aquatic species; the Wilderness Act provided for wilderness designations that required sufficient protection for natural streams in the wilderness areas; and the EPA pressed for water quality protection and bypass flows from federal projects for transbasin diversions and reservoirs. These federal actions required a state response if the state was to maintain control over its water supply. In fact, the federal imposition of bypass flows was a major impetus for recognizing instream flows as a mechanism to preserve rivers without federal bypass flow requirements. NEPA requirements for water quality protection and bypass flows in the Fryingpan River and other tributaries to the Roaring Fork River to prevent environmental degradation from the proposed transbasin diversion of the Fryingpan Arkansas River Project ("Fry-Ark Project") led to discussions of having the state determine how to regulate instream or bypass flows.<sup>36</sup> Throughout these discussions, a concern persisted about not allowing riparian-type rights in streams through private property. The prior appropriation tradition and its recodification in the '69 Act was not to be lightly or easily modified in Colorado. Discussion about instream flow protection necessarily included articulation of the need to preserve the natural environment, as clearly distinguished from protecting the riparian water rights system.

Felix Sparks, Director of the CWCB in 1973, explained the challenge that the state faced, and specifically how the federal bypass requirements of the Fryingpan Arkansas Project could provide the practical basis and need for the state's instream flow program—a new program to effectuate stream protection through entire reaches rather than simply at single bypass points. Looking back in 1985, Sparks wrote<sup>37</sup>:

Being a long-time student of Colorado water law, it was my firm opinion for many years that the instream appropriation of water in this state for the protection of aquatic habitat was utterly impossible. However, in the late 1950s and early 1960s, as the then director of the Colorado Water Conservation Board, it became my responsibility to negotiate a set of operating principles for one of the state's major reclamation projects the Fryingpan Arkansas project. Since that project contemplated transbasin diversions . . . the controversial and complex problem of preserving some reasonable aquatic habitat in these tributaries became a focus of attention. . . . [T]he problem was solved by prescribing that certain minimum stream flows must be left in the various tributaries below the diversion points.

However, the question that was always foremost in my mind as we negotiated the release of these minimum flows was—how could we protect those minimum flows after they had been released at the various diversion points? The reason this question haunted me was there was absolutely nothing in our state

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35. Safe Drinking Water Act of 1974, Public Law 93-523 (42 USC 300f *et seq.*).

36. The Fry-Ark Project diverts waters from Eagle and Pitkin County near Aspen and Basalt through tunnels across the divide to the Arkansas River Basin on the front range of the Colorado Rocky Mountains.

37. Legislative Protection of Aquatic Habitat in Colorado, Felix L. Sparks, Colorado Commissioner Upper Colorado River Commission, Before the Western Association of Fish and Wildlife Agencies, July 17 1985, pp. 2-3. (emphasis added).

law to prevent other appropriators from taking these releases as soon as they left the various project diversion points. By necessity, however, a somewhat *unholy alliance* was formed to persuade the state legislature to amend state law so that aquatic habitat could be protected to at least some degree. This effort was joined by many private citizens, including some lawyers, who perceived the necessity of preventing the complete destruction of the many Colorado streams and lakes.

#### B. THE NEW INSTREAM FLOW LAW, S.B. 97 (1973)

The “unholy alliance”<sup>38</sup> that Felix Sparks referenced was comprised of “water buffalos”<sup>39</sup> and environmental leaders. In 1973, a Republican General Assembly and a Republican governor approved a relatively short and concise bill creating Colorado’s Instream Flow Program. The General Assembly passed S.B. 97, vesting the CWCB with the authority, on behalf of the people of the state of Colorado, to appropriate or acquire such waters of natural streams and lakes as may be required to preserve the natural environment to a reasonable degree without a diversion “in the conventional sense.”<sup>40</sup> With S.B. 97, Colorado finally recognized the need to balance the environmental benefits that come from maintaining water in the stream with its long-established framework for diverting water rights within the confines of the prior appropriation system, and without opening the door to any riparian rights for adjacent land owners.

S.B. 97 assigned the CWCB the responsibility and authority to appropriate instream flows by redefining what constituted: (a) “appropriation,” (b) “diversion,” and (c) “beneficial use,” to now include: (1) appropriation by CWCB Board action; (2) without diversion for; (3) non-consumptive environmental beneficial use through a stream reach. However, the idea of allowing water rights for non-diversionary, non-consumptive uses in the stream was so revolutionary that there was a movement to not only pass legislation, but also to take the matter to the public for a vote to amend the constitution. Looking back in 1976, David Robbins, First Assistant Attorney General representing CWCB in 1973, explained:

The State of Colorado had two basic choices when it determined that minimum stream flow and lake level protection was in the public interest. The first possibility was to amend article XVI of the constitution to specify that appropriations could in fact be made for instream purposes under the terms of section 6. This approach would have required the expenditure of large amounts of money and would have created a change in the law that few individuals in Colorado had considered. It was the judgment of the supporters of Senate bill (sic) 97 that the appropriate way to provide [ISFs] . . . was through an addition to the statutes that codified the procedures for appropriating and administering waters within the state.<sup>41</sup>

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38. *Id.*

39. In Colorado’s water community, water development leaders frequently are referred to as “water buffaloes.”

40. *Colorado River Water Conservation Dist. v. Colorado Water Conservation Bd.*, 594 P.2d at 574.

41. David W. Robbins, “Quantification of Instream Flow Needs by Law in Colorado,” in *Proceedings of the Symposium and Specialty Conference on Instream Flow Needs 2* (page 4) .

“Whether or not the foregoing change in the Colorado law will satisfy the constitutional requirements as interpreted by the state supreme court [was] yet to be decided.”<sup>42</sup> During the 1973 legislative hearings, speaking on behalf of the CWCB, Mr. Sparks testified that because of constitutional concerns, a vote of the people might be advisable. Explaining that the members were comprised of mostly “water users” and “extremely conservative people,” like “cattlemen” and “farmers,”<sup>43</sup> Mr. Sparks pondered a constitutional amendment, stating:

We concluded that it might be a deception to the people of the state of Colorado to proceed solely with a statutory method at this time. We feel that there still remains a grave issue as to whether or not the constitutional words “to divert” can be changed by statute. Therefore, we urge the Colorado General Assembly to . . . go ahead with the statutory language which would permit us then to start classifying these streams and secondly to submit to the voters in 1974 a constitutional amendment which, in our opinion, then would make it legal to proceed with what the legislature has already authorized, if it passes this bill.<sup>44</sup>

While many of the General Assembly’s discussions about S.B. 97 concerned the constitutionality of appropriating a water right by keeping water in the stream, many conversations concerned the fact that appropriations would be junior rights on a stream while the right to acquire would provide senior water rights. The General Assembly recognized that 100 years of water rights already existed prior to S.B. 97. Thus, in addition to allowing the CWCB to appropriate new junior water rights for ISFs, the General Assembly also allowed acquisitions of more senior water, thereby providing two mechanisms for CWCB to obtain ISF water rights. On February 12, 1973, Senator Anderson stated that in addition to the authority to appropriate, the CWCB should also be allowed to acquire water for the natural environment, observing that an appropriation would provide “a 1973 or later date, which isn’t much of a ride on some of these streams. By allowing them to acquire, this would allow them to purchase an earlier right and dedicate it to this purpose.”<sup>45</sup> Further encouraging CWCB’s voluntary market-based approach to acquiring water rights, Senator Anderson testified, “I think that by not giving them the right of eminent domain, I don’t feel that they need it, they can go to the marketplace if they need it and acquire water this way and dedicate it to that use.”<sup>46</sup> Representative Smith also opined on the voluntary market-based approach during the 1973 legislative hearings, explaining that the “state, as far as I know can already go out and buy water - it is a question of whether the owner wants to sell it. So I don’t think that that opens up anything that should be of concern to anyone. If the state wants to buy your water and you want to sell it you can already do that. And the mere fact that the word ‘acquire’ is in there does not really give the state any

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42. *Id.*, at 5.

43. Hearings before the Senate Committee on Agriculture, Livestock and Natural Resources, February 5, 1973, pp. 2-3.

44. *Id.*

45. Statement of Senator Anderson, Senate Second Reading, Colo. Senate Bill 97, February 12, 1973, transcript at page 2.

46. *Id.* at 3.

power that it doesn't already have."<sup>47</sup>

In summary, S.B. 97 established new appropriations of instream flow and natural lake level rights as: (a) in-channel or in-lake appropriations of water; (b) for minimum flows between specific points on a stream, or level in natural lakes; (c) made exclusively by the CWCB; (d) to preserve the natural environment to a reasonable degree; and (e) to be administered within the state's water rights priority system. S.B. 97 also authorized the CWCB to acquire existing senior water rights for ISFs. Such acquisition authority has been clarified and bolstered in several subsequent bills during each decade of the ISF program: in the 1980s, 1990s, 2000s, and 2010s.

### C. CONSTITUTIONAL SUPREME COURT CHALLENGE

The General Assembly passed S.B. 97, enacting the ISF law, but because the non-diversion issue was not brought to the public to vote on a constitutional amendment, the constitutional question remained. Individual legislators had expressed concerns with the issue "as to whether or not the constitutional words "to divert" (of Article XVI, section 6) can be changed by statute to allow "diversion to mean leaving water in the stream False"<sup>48</sup> The concept was so revolutionary that the General Assembly sent interrogatories to the Colorado Supreme Court to determine the constitutionality of granting appropriations without diversions in light of Section 6, Article XVI of the Colorado Constitution.<sup>49</sup> The court declined to answer the interrogatories.<sup>50</sup>

Constitutionality remained a question for which the CWCB needed an answer before investing significant resources in the program, including field data collection and analyses, board presentations and discussions, and water court action. A Supreme Court opinion was needed. Felix Sparks, as Director of the CWCB, David Robbins as the First Assistant Attorney General representing the CWCB, and Scott Balcomb, representing the Colorado River Water Conservation District ("River District"), together planned what would eventually become the constitutional challenge using the Crystal River and Avalanche Creek ISF appropriations to present the controversy.<sup>51</sup> The Colorado Supreme Court confirmation was six years in the making, but, at last, affirmed the constitutionality of the instream flow law.

#### 1. First Argument—Diversion Requirement

In the Colorado Supreme Court challenge<sup>52</sup>, the River District argued that Senate Bill 97 was unconstitutional because there was no physical diversion as required by Article XVI, Section 6, of the Constitution and also that the law was

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47. Statement of Representative Smith, House Committee on Natural Resources, Colo. S.B. 97, February 28, 1973, transcript at page 9.

48. Legislative History, SB 97 Hearings Before the Senate Committee on Agriculture, Livestock, and Natural Resources, February 5, 1973, pp. 2, 3.

49. House Journal - 76th Day - March 19, 1973, pp. 626-627.

50. House Journal - 76th Day - March 19, 1973, p. 666. Legislative History, S.B. 97 Hearings Before the Senate Committee on Agriculture, Livestock, and Natural Resources, February 5, 1973, pp. 1-5; § 148-21-3, C.R.S. (1973).

51. Interview with David Robbins, January, 2019.

52. *Colo. River Water Conservation Dist.*, 594 P.2d 570.

unconstitutionally vague.<sup>53</sup> The court disagreed, holding that Senate Bill 97 was constitutional. The court emphasized that it was “not hereby causing any erosion of the many opinions of this court, some of which are cited above, holding that a diversion is an essential element of the water appropriations involved in those cases. The many cases are distinguishable.”<sup>54</sup> Consequently, while the Colorado Water Conservation Board could appropriate instream flows, other appropriators were still subject to the long-standing diversion requirement.<sup>55</sup>

## 2. Second Argument—Improper Delegation of Authority

The River District also argued that the General Assembly made an impermissible delegation of legislative authority to the CWCB and that the CWCB had failed to establish the quantity of water necessary to preserve the natural environment to a reasonable degree.<sup>56</sup> The CWCB pointed out that it could avail itself of specific expertise as needed. The court agreed with the CWCB, holding that “we cannot agree that the standards are not such as could be implemented by agencies having specific expertise regarding the preservation of flora, fauna and other aspects of the natural environment.”<sup>57</sup> The court stated:

To require an enumeration of the forms of plant and animal life, as well as natural formations, which the legislature wished to preserve would be to impose an impossible task. The legislative objective is to preserve reasonable portions of the natural environment in Colorado. Factual determinations regarding such questions as which areas are most amenable to preservation and what life forms are presently flourishing or capable of flourishing should be delegated to an administrative agency which may avail itself of expert scientific opinion.<sup>58</sup>

## 3. Third Argument—Priority System

The River District argued that the portion of section 37-92-102 mentioning “waters available by law” means that later junior appropriators may have their rights adjudicated, and those rights will be superior to the CWCB’s ISFs.<sup>59</sup> The court disagreed, holding that the “legislative intent is quite clear that these appropriations are to protect and preserve the natural habitat and that the decrees confirming them award priorities which are superior to the rights of those who may later appropriate. Otherwise, upstream appropriations could later be made, the streams dried up, and the whole purpose of the legislation destroyed.”<sup>60</sup> Finally, the River District argued that the CWCB can only appropriate rights to water already adjudicated to senior appropriators downstream.<sup>61</sup> The court again disagreed, holding “[w]e simply cannot follow the logic of the

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53. *Colo. River Water Conservation Dist.*, 594 P.2d at 575.

54. *Id.*, at 574.

55. *Colo. River Water Conservation Dist.*, 594 P.2d at 574 (“We wish to emphasize that we are not hereby causing any erosion of the many opinions of this court. . .holding that a diversion is an essential element of the water appropriations involved in those cases.”).

56. *Colo. River Water Conservation Dist.*, 594 P.2d at 577.

57. 594 P.2d 570, at 576.

58. *Id.*

59. *Id.*, at 575.

60. *Id.*, at 576.

61. *Id.*, at 575.

second contention to the effect that the Colorado Water Board [sic] is entitled only to water already appropriated by downstream seniors. We fail to see how downstream appropriators are going to be affected by the Colorado Water Board's decrees, nor any reason for so circumscribing the effect of the legislation."<sup>62</sup>

Thus, the court did not overrule the diversion requirements set forth in *Guiraud*, *Luthe*, *Rocky Mountain Water* and *Miller*, or as understood by the General Assembly. Rather, the court confirmed the "obvious" intent of the legislature to allow CWCB appropriations of ISFs without diversions.<sup>63</sup> The court confirmed that factual determinations regarding the quantity of water needed to preserve the natural environment are rightly "delegated to an administrative agency which may avail itself of expert scientific opinion" to determine the habitat and life forms to be preserved and the amount of water needed for ISFs on a case-by-case basis.<sup>64</sup> The court confirmed that ISF appropriations by the CWCB are water rights unto themselves and cannot be subsequently appropriated by junior appropriators and that ISFs are not dependent on downstream uses or appropriations, thus confirming the legislative intent that ISFs should be administered within the priority system according to their decreed priority dates. The court reasoned that if not administered within the priority system, the later upstream appropriations could dry up streams, which would destroy the whole purpose of the legislation.<sup>65</sup>

Consequently, while the CWCB could appropriate instream flows without diversion for non-consumptive instream uses, other appropriators were still subject to the long-standing diversion requirement.<sup>66</sup> The later advent of recreational in-channel diversions, (i.e., artificial white water features) allowed a type of non-diversion from the stream wherein the water is to be controlled in its natural course.<sup>67</sup>

#### D. EXAMPLES: THE FIRST ISF WATER RIGHTS

##### 1. Fryingpan-Arkansas Project Mitigation in the Roaring Fork Basin

The CWCB appropriated the first ISFs in 1973, adjudicating several ISFs on reaches from the Fry-Ark Project diversion headgates down to confluences with other creeks to protect federally required bypass flows. The first ISF decree (Case No. W-1945) was entered on April 25, 1974 on the Fryingpan River, providing protection from the confluence with Rocky Fork Creek (at the outflow from Ruedi Reservoir) to the Roaring Fork River in the amounts of 39 cfs (Nov 1 - April 30) and 110 cfs (May 1 - Oct 31).<sup>68</sup>

##### 2. Mt. Werner Water and Sanitation District

One of the first acquired water rights for ISFs use was dedicated by Mt.

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62. *Id.*

63. *Id.* at 574.

64. Colorado Water Conservation Bd., 594 P.2d at 576.

65. *Id.*

66. *Id.*, at 574.

67. See *St. Jude's Co. v. Roaring Fork Club, L.L.C.*, 351 P.3d 442 (Colo. 2015).

68. Water Court Case No. W-1945 (1973), Water Division 5.

Werner Water and Sanitation District (“MWW&SD”) to the CWCB via decree in 1976. MWW&SD desired to keep water in the river and viewed the new ISF law as a way to protect the water through the reach. At the November 1, 1978 CWCB Board meeting, when Mr. Robbins, attorney for CWCB, thanked John Fetcher of MWW&SD for the dedication of water rights “for the purpose of maintaining minimum stream flows,” Mr. Fetcher replied, “Well, it is an indication that those of us who are concerned not only with supplying water to our municipalities involved in the recreation industry are also concerned with minimum stream flows, that being an integral part of the recreation business, as you all know.” In other words, as Mr. Fetcher added, “[i]t is a good move on our part, and it is partly a selfish move.”<sup>69</sup>

#### IV. CLARIFYING AND REFINING THE INSTREAM FLOW PROGRAM IN THE 1980’S

##### A. IN 1981, THE GENERAL ASSEMBLY SUBJECTED ISFS TO EXISTING USES AND PRACTICES ON THE STREAM, WHETHER OR NOT PREVIOUSLY DECREED

In 1981, the General Assembly promulgated Senate Bill 414 (“S.B. 414”). The act modified the Instream Flow Program in three ways. First, with regard to private property, the General Assembly clarified that the CWCB had no right of eminent domain for a right-of-way onto private property along its instream flow water rights. Secondly, the bill added a three-part requirement for Board determinations, including: (a) that water is available to preserve the natural environment; (b) that there is a natural environment that can be preserved; and (c) that such environment can exist without material injury to water rights.<sup>70</sup> Finally, S.B. 414 added a provision to section 37-92-102(3)(b) providing that instream flow “appropriations” would be subject to pre-existing uses and practices, whether previously decreed or not. The original proposed language included a reference to confirmation within the instream flow decree:

Any such appropriation shall be subject to the [present] uses or exchanges of water being made by other water users pursuant to [appropriations or] practices in existence on the date of such appropriation, whether or not previously confirmed by court order or decree, *and, if not previously confirmed, as may be confirmed by the court in the decree granting such minimum streamflow or lake level appropriation.*<sup>71</sup>

S.B. 414, as introduced, would have required water court approval within the original decree for the particular appropriated ISF to be subordinated. However, based on concerns that a water user could miss the opportunity to have its water practice documented in the ISF decree at the time of its adjudication, the General Assembly removed the requirement, allowing a water user to have the option of coming in for confirmation at the time of the ISF decree

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69. CWCB board meeting minutes, November 1, 1978, at 35-36.

70. S.B. 81-414: Establishment of Principles and Limitations Which Govern Appropriations of Water Made by the Colorado Water Conservation Board for the Purpose of Preserving the Natural Environment, ch. 431, § 37-92-102(3)(a)-(d), Colo. Session Laws 1784-5.

71. SB 414 (1981), as proposed (*emphasis added*).

or coming to the court for a later confirmation. On April 1, 1981, Senator Soash stated in reference to section 102(3)(b) that “if you have got an exchange presenting which hasn’t been confirmed in court, that you can go in at the time that there is a minimum stream flow filing, when that’s adjudicated, you can get your exchange confirmed in court.”<sup>72</sup> As originally drafted, S.B. 414 also attempted, but failed, to prevent the CWCB from filing any statements of oppositions in court to protect ISFs from other water court applications, including changes of senior water rights and augmentation plans. The proposed restriction on filing statements of opposition became a focal point of the legislative discussions and its historical documentation.

Gregory Hobbs played a significant role in revising earlier versions of S.B. 414 by providing both testimony and correspondence as a member of the Legislative Committee of the Colorado Water Congress. Generally, Mr. Hobbs argued against language that would have prevented the CWCB from legally protecting its water rights against changes of water rights. If statements of opposition were not allowed, then effectively changes of water rights could “eat up the in-stream flow water rights.”<sup>73</sup> Mr. Hobbs wrote to Governor Lamm, on behalf of the CWCB, the Legislative Committee of the Colorado Water Congress and others, advising against a threatened veto of the bill. Regarding section 102(3)(b), Mr. Hobbs stated that “the Water Conservation Board in the event of a dispute can interpret its own enabling Act in the above fashion by challenging whether a particular use or exchange was “present” and “being made” pursuant to “appropriation” or “practice” in existence on the date of the minimum stream flow appropriation.”<sup>74</sup>

On June 22, 1981, Governor Lamm allowed S.B. 414 to become law without his signature, neither approving nor vetoing the act, and explained:

Although I question the symbolic and practical purposes of new legislation which simply restates existing law and administrative practices, I have allowed Senate Bill 414 to become law without my signature . . . I have received extensive legal assurances that Senate Bill 414 does not subordinate minimum stream flow water rights to future changes or exchanges, but does allow continuation of exchanges or practices in existence at the time such minimum flow appropriations are made. . . I hope Senate Bill 414 will put this issue to rest and neutralize future possible efforts to repeal the minimum stream program.<sup>75</sup>

The legislative history shows that the General Assembly and the Governor showed great support for the purposes of the ISF Program and sought to pre-

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72. Statement of Senator Soash, Senate Second Reading, Colo. Senate Bill 81-414, April 1, 1981, at page 3.

73. Statement of Greg Hobbs, Transcript of Senate Committee on Agriculture, Natural Resources, and Energy, Colo. Senate Bill 810414, March 12, 1981; Letter from Gregory J. Hobbs, Jr. to Governor Lamm, Re: Support of Northern Colorado Water Conservancy District for SB 414, Minimum Stream Flows, June 4, 1981.

74. Letter from Gregory J. Hobbs, Jr. to Governor Lamm, Re: Support of Northern Colorado Water Conservancy District for SB 414, Minimum Stream Flows, June 4, 1981.

75. Letter from Richard D. Lamm, Governor to the Colorado State Senate, June 22, 1981. *Senate Journal*, June 29, 1981.



vent injury to ISFs by having the CWCB continue to file statements of opposition in water courts to protect ISFs. The history shows that the CWCB, as an agency interpreting its enabling statute, has broad discretion to define what uses are “present” and “being made” pursuant to “appropriation” or “practice” in existence on the date of the ISF appropriation when evaluating a claim of an existing use under section 37-92-102(3)(b).<sup>76</sup> Finally, there was recognition that ISFs take their place in the priority system.

**B. IN THE MID-1980S, THE GENERAL ASSEMBLY RE-EMPHASIZED AND STRENGTHENED THE CWCB’S ACQUISITION AUTHORITY WITH S.B. 91 (1986) AND S.B. 212 (1987)**

In 1986, the General Assembly enacted Senate Bill 91 (“S.B. 91”), which reaffirmed and bolstered Colorado’s ISF Program to maintain state control over streams and water supply in Colorado, in a political climate when federal agencies were securing water rights for federal lands. In response to assertions that Colorado’s ISF Program was too junior in this prior appropriation state to be effective, S.B. 91 bolstered the ISF program by reaffirming the CWCB’s authority to acquire senior water rights for ISFs, while maintaining their senior status in the priority water rights system. The Act added further language detailing the CWCB’s authority to enter the free market to acquire, by grant, purchase, bequest, etc., water, water rights, and interests in water and that the CWCB may use for instream flows after obtaining water court decrees for changes of water rights and augmentation plans.<sup>77</sup> Note that in the following year, “exchanges” were added to the list of mechanisms in S.B. 212, such that the statute now reads “. . . applications for changes of water rights, *exchanges*, or augmentation plans. . .”<sup>78</sup>

In response to federal assertions that water is needed for federal land, especially wilderness areas, the Colorado General Assembly added a federal recommendation requirement to the existing state parks and wildlife recommendation requirement, adding that “[t]he board also shall request recommendations from the United States Department of Agriculture and the United States Department of the Interior.”<sup>79</sup> Furthermore, S.B. 91 extended the recommendation requirement to appropriations as well as acquisitions. Bolstering the acquisition program and attaching federal recommendation input provided a nexus with federal entities and “greater protection for wilderness areas than a junior reserved water right in situations where there are conflicts with pre-existing [senior] water rights.”<sup>80</sup>

Several legislators noted the value of the CWCB acquiring senior water rights within a voluntary market that values investments by water rights holders

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76. Letter from Gregory J. Hobbs, Jr. to Governor Lamm, Re: Support of Northern Colorado Water Conservancy District for SB 414, Minimum Stream Flows, June 4, 1981.

77. S.B. 86-91: Acquisition of Water by the Colorado Conservation Board for the Purpose of Preserving the Natural Environment to a Reasonable Degree, ch. 235, § 37-92-102(3), Colo. Session Laws 1095-6.

78. S.B. 87-212: Obtaining Water Rights for Instream Flows by the Colorado Water Conservation Board, ch. 269, § 37-92-102 (3), Colo. Session Laws 1305-6.

79. S.B. 86-91.

80. Gregory J. Hobbs, Jr., February 10, 1986, “speak-out letter.”

who might wish to convey their water rights to the CWCB for use in a stream or natural lake to preserve the natural environment with a senior priority. On February 13 and 17, 1986, Representative Williams and Representative McCormick acknowledged, respectively, the role Gregory Hobbs played in the law.<sup>81</sup> Representative Williams specifically refers the General Assembly to the February 10, 1986, "speak-out letter" by Hobbs. In that *Speak Out/Letter*, Mr. Hobbs stated:

Under this system water rights may be bought, sold, leased or exchanged on the open market, realizing value both to those who previously invested in water development and those who can make a changed use for the water utilizing the advantage of a pre-existing priority within the state's system of water administration.<sup>82</sup>

Expressing the value of senior water rights acquisitions, Senator Ezzard, sponsor of the bill, wrote a *Rationale*, stating:

Cities sometimes buy senior agricultural rights, for example, to fill municipal needs. Instream flow needs can be met in the same fashion, through acquisition and conversion of other water rights to instream flow use. This may be superior in key instances for preserving the natural environment than filing for relatively junior water rights. Also in this way the economic value of a farmer's water right, for example, can be realized. Organizations like the Nature Conservancy are interested in the investment of private and public funds for the acquisition of instream flows to be administered with state water right systems. . . . A program which combines instream flow appropriations with acquisition of more senior rights or dedication of unused water and storage in federal reservoirs has great promise for helping to resolve the endangered species and wilderness controversies which threaten to preempt our Colorado water rights system.<sup>83</sup>

In presenting an analysis of S.B. 91 the year that it passed, Mr. Hobbs wrote a summary highlighting the CWCB's acquisition authority as distinguished from the CWCB's appropriation authority. Under its acquisition authority, the state is better equipped to preserve streams to address the federal reserved rights controversies. As Mr. Hobbs explained, the CWCB can use its acquisition authority to change senior water rights to "obtain the benefit of senior priorities" and to file augmentation plans, thus the CWCB can "utilize the full scope of Article 92 and Colorado's free market system of water rights to acquire water."<sup>84</sup> In reference to augmentation plans, Justice Hobbs wrote:

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81. Statement of Senator McCormick, Transcript of Senate Floor Debate, Colo. Senate Bill 86-91, February 17, 1986; Statement of Senator Williams, Transcript of Senate Floor Debate, Colo. Senate Bill 86-91, February 17, 1986.

82. *Id.*

83. Senator Martha Ezzard, "Rationale for SB 86-91, A Bill Concerning the Powers of the Water Conservation Board in Utilizing Water for Preservation of the Natural Environment," (1986).

84. Gregory Hobbs, Jr., "Colorado's Instream Flow Law and Senate Bill 91: State Water Rights for Preservation of the Environment, Can They End the Federal Reserved Water Rights Instream Flow Controversy?," at 20-21, in *How the Rivers Run, An Analysis of Current Issues in Colorado Water Law*. (Continuing Legal Education in Colorado, Inc., University of Denver Law School 1986).

The acquisition authority of Senate Bill 91 also provides the context for working with new water project sponsors to provide instream flows as part of their projects, and creates an additional market for the use of augmentation credits which are generated by water users through development and administration of augmentation plans. The annual rental market for storage and direct-flow water which has grown up in the state, particularly in the Northern District area, could be tapped as part of the Board's program. The explicit authority of the Board to accept donation of water rights for purposes of the instream flow program may provide a tax incentive for making such transactions.<sup>85</sup>

### C. WITH S.B. 87-212, EXCLUSIVE AUTHORITY RESTATED AND BOLSTERED

In 1987, the ISF Program was again before the General Assembly with Senate Bill 212 ("S.B. 212"), this time to reaffirm and bolster the CWCB's authority, and prevent any other person from appropriating water within a stream for any purpose whatsoever. S.B. 212 came as a response to several water court claims and decrees for instream rights by non-diversion, including the Fort Collins boat chute case.<sup>86</sup> Representative Paulson explained:

The unfortunate circumstance we find today is that people have usurped the original good public purpose of allowing the Conservation Board to make appropriations on behalf of the public in general to enhance and protect the environment and are now filing instream water rights for any number of purposes not on behalf of the people of the state of Colorado, but in many instances for purposes that range all the way from a flow for recreation purposes for their own even they don't own the land or the riparian rights, to other purposes such as blocking the construction of water projects. This unfortunate circumstance leads us to Senate Bill 212. Senate Bill 212 is an attempt to clarify once again for the courts that will ultimately have to decide this issues that in 1973 the Legislature really meant it when they only permitted the Conservation Board to make an instream non-diversion appropriation.<sup>87</sup>

S.B. 212 added the word "exclusive" to the CWCB's authority to appropriate, further adding explicit language: "In the adjudication of water rights pursuant to this article and other applicable law, no other person or entity shall be granted a decree adjudicating a right to water or interests in water for instream flows in a stream channel between specific points, or for natural surface water levels or volumes of natural lakes, for any purpose whatsoever."<sup>88</sup>

For acquisitions, S.B. 212 added a Board procedure for contracts and agreements for acquisitions of water, water rights, and interests in water, setting a 120-day timeframe for the Board to determine what terms and conditions it will accept, which timeframe can be extended by the requesting party. S.B. 212 also provided that such contracts shall be enforceable in water court as a water matter.<sup>89</sup>

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85. *Id.* at 22-23.

86. *City of Thornton v. City of Fort Collins*, 830 P.2d 915 (Colo. 1992).

87. Floor Statement of Representative Paulson Regarding S.B. 212, June 4, 1987, at p. 2.

88. S.B. 87-212: Obtaining Water Rights for Instream Flows by the Colorado Water Conservation Board, ch. 269, SS 37-92-102 (3), Colo. Session Laws 1305-6 (codified at C.R.S. 37-92-102 (3) 2018).

89. *Id.*

#### D. EXAMPLES: PARTNERING UP IN THE 1980S

In the 1980s, the CWCB's ISF program continued to assist entities with federal environmental bypass and mitigation requirements, and also began to assist with coordinated aquatic species recovery programs.

##### 1. ISFs Assist Entities with Federal Environmental Bypass and Mitigation Requirements

###### *i. Windy Gap Subordination*

In 1980, as part of developing its Windy Gap Project, the Northern Water Conservancy District ("Northern") reached a settlement with Middle Park water users ("The West Slope Agreement," dated April 30, 1980).<sup>90</sup> As part of that settlement, Northern entered into a Memorandum of Understanding ("MOU") with the Colorado Department of Natural Resources (Division of Wildlife<sup>91</sup>) to support rates of flow through three segments of the Colorado River. The MOU provides fixed flow rates of 90 cfs, 135 cfs, and 150 cfs, with a limited flushing flow allowance in some years for 450 cfs over 50 hours between April 1 through June 30, limited to the inflow rates, "in the matter of a minimum stream flow from the Windy Gap Diversion site to the mouth of the Blue River".<sup>92</sup> Later in 1980, the CWCB appropriated and filed in water court for adjudication of in-stream flow water rights on the Colorado River in these three reaches in the amounts specified in the MOU.<sup>93</sup>

###### *ii. Green Mountain Reservoir, Ski Areas, and Summit County ISFs*

In the 1980s, the CWCB and various entities in Summit County entered into a series of agreements that provided ISF protection for local streams while allowing certain levels of snowmaking diversion and water development to proceed in the County. These agreements provided the basis for the County and ski areas to meet NEPA requirements related to securing Green Mountain Reservoir water service contracts from the Bureau of Reclamation, while allowing the Board to preserve the high quality fisheries in the Upper and Lower Blue River and its tributaries.<sup>94</sup>

###### *iii. Role of ISFs in Boulder Creek Federal Permit for Lakewood Reservoir Pipeline Across USFS Land*

Culminating in 1990, the CWCB and the City of Boulder entered into a

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90. Agreement Concerning the Windy Gap Project and the Azure Reservoir and Power Project, dated April 30, 1980.

91. In 2011, the Division of Wildlife merged with the Division of Parks and Outdoor Recreation and are now collectively called Colorado Parks and Wildlife, but both agencies will be referenced with the name appropriate to the time frame).

92. Memorandum of Understanding between Municipal Subdistrict, Northern Colorado Water Conservancy District and Colorado Department of Natural Resources (Division of Wildlife), Relating to Minimum Stream Flow In Association With the Windy Gap Diversion Project, dated June 23, 1980.

93. Water Court decrees for Case Nos. 80CW446, 80CW447, and 80CW448, Water Division 5.

94. See generally ISF water court decree and attached agreements in Case No. 85CW627, Water Division 5, which includes consolidation of 21 individual instream flow cases, 746 pages.

Donation Agreement, which conveyed various senior water rights to the Board for ISFs in Boulder Creek and North Boulder Creek. In most years, the stream flow through town drops in July to approximately 1 cfs as a result of irrigation demands. The donated rights have allowed the CWCB to maintain ISFs up to 15 cfs in that same reach of stream.<sup>95</sup> Boulder, in turn, was able to rely upon the Donation Agreement in discussions with the Forest Service to help satisfy regulatory requirements related to Boulder's diversions on North Boulder Creek.

## V. FINE TUNING THE LAW IN THE 1990'S

As the CWCB continued to appropriate new ISFs and protect its existing decreed ISFs, it became apparent that the CWCB needed to adopt procedures and rules to inform the public and guide administrative actions.

### A. PROCEDURES AND RULEMAKING

In response to the passage of Senate Bill 414 ("S.B. 414") in 1981, the Board adopted the first standard procedures for initiating, processing, filing, and maintaining ISF and natural lake level appropriations.<sup>96</sup> The procedures addressed: (1) requests for recommendations from the Division of Wildlife and Division of Parks and Outdoor Recreation; (2) CWCB staff review of such recommendations, preparation of its preliminary recommendations, issuance of preliminary and final notices, processing of public comments, and issuance of final recommendations; (3) Board action, including making the three determinations required by statute; (4) filing of water court applications; and (5) procedures for filing statements of opposition. These procedures required Board approval of every stipulation staff negotiated in water court cases, both for CWCB applications and cases in which the CWCB was in opposition, prior to filing the stipulation in water court.

### B. THE BOARD'S FIRST PROMULGATION OF RULES GOVERNING THE INSTREAM FLOW PROGRAM

At the January 1991 CWCB meeting, the CWCB staff and the Attorney General's Office provided a general outline and proposed schedule for the promulgation of rules governing the administration of the Instream Flow Program. Over the course of the next two years, the Board and its staff received significant public input on and held numerous discussions of the proposed rules at meetings and workshops. In November of 1993, the Board adopted the "Statement of Basis and Purpose and Rules and Regulations Concerning the Colorado Instream Flow and Natural Lake Level Program" ("ISF Rules"), which became effective in December of 1993.<sup>97</sup>

The water community was keenly interested in these rulemaking proceedings and provided significant input, particularly into ISF Rule 8.00 "Inundation of ISF Rights" (now ISF Rule 7.00). The story of ISF Rule 8.00 illustrates that

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95. See water court decree in Case No. 90CW193, Water Division 1.

96. See "Procedures for the Administration of the Instream Flow/Natural Lake Level Program, July 1981."

97. 2 CCR 408-2.

degree of public interest in the Board's rulemaking activities.

### 1. Inundation of ISF Water Rights

#### *i. Impetus for Addressing the Issue of Inundation*

In 1986, the CWCB staff, on behalf of the Board, filed a Statement of Opposition ("SOP") to the St. Vrain and Left Hand Water Conservancy District's water court application for the proposed 287,000 acre-foot Smithy Reservoir, which would have inundated approximately 3.5 miles of the Board's ISF water right on St. Vrain Creek. When staff brought the SOP to the Board for ratification, the District's attorney argued that no injury would result because the reservoir would add water to the ISF water right rather than diminish the flow. After discussion, the Board concluded that inundation was not injury, and directed staff to withdraw the SOP. Subsequently, the Sierra Club filed a SOP in the case to protect the ISF water right, and later that year, the District withdrew its water right application. From 1987 to 1993, the CWCB filed SOPs in eight cases based in part on proposed inundations of ISF and natural lake level water rights. One of those cases, the application of the City of Aurora and Arapahoe County for Union Park Reservoir, which would have inundated the CWCB's ISF water right on Lottis Creek, was set for trial in June 1991. Questions arose as to what the Board's policy on inundation should be, and in February 1990, CWCB Director Bill McDonald requested public input on the following questions:

- "Whether the Board should file Statements of Opposition to applications for conditional storage rights if the conditional right sought would result in inundation of a stream segment upon which the Board holds an ISF appropriation, and,
- Were statements of opposition to be filed, what terms and conditions the Board can and should seek to protect its ISF appropriation?"

This request initiated a lengthy public process that ultimately resulted in the adoption of ISF Rule 8.00 concerning Inundation of ISF Rights. In February of 1990, the CWCB held a special meeting to hear comments on how the Board should handle the inundation of ISF water rights. The Board heard oral testimony and accepted written statements on the issue. Nearly 60 written statements were received, and several articles appeared in local newspapers regarding the issue. Environmental groups including the National Wildlife Federation, Environmental Law Society, Environmental Defense Fund, Sierra Club, Colorado Mountain Club, Colorado Environmental Coalition, Trout Unlimited, and Gunnison Basin POWER; state and federal agencies, including U.S. Fish & Wildlife Service, U.S. Environmental Protection Agency, Colorado Division of Wildlife, and Division of Parks and Outdoor Recreation; water users groups and municipalities including Arapahoe County, Upper Arkansas Water Conservancy District, the cities of Loveland, Colorado Springs, Denver, and Aurora, Northern Water Conservancy District, Colorado Water Congress and Cache la Poudre Water Users; and many private citizens and law firms filed written statements.<sup>98</sup> In July of 1990, to address the interim period prior to

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98. Instream Flow and Natural Lake Level Program - Rules and Regulations, Administrative Record, Volume I 0000001-0000497; see pages 0000027-0000044, 000101-000264.

promulgating rules, the CWCB adopted a policy providing that it would file SOPs in all cases proposing to inundate an ISF water right, with the Board deciding on a case-by-case basis whether to allow inundation and what terms and conditions it would require to protect the affected ISF water rights.

The CWCB ultimately adopted ISF Rule 8.00 as part of the original ISF Rules to implement the ISF Program. The process covered a period of nearly seven years and involved extensive public comment and testimony (both written and oral), legislative input, Board review and comment, Instream Flow Subcommittee review and comment, and Attorney General review, which culminated in a formal rulemaking hearing. The CWCB concluded that inundation of an ISF water right may be an interference with the Board's usufructory right confirmed by the ISF decree. The CWCB considered its decree for an ISF water right to represent a property right to be used to preserve the natural environment. In this context, the term "interference" means "any action by a third party that hampers the CWCB's ability to preserve the stream habitat or other natural environment for which the ISF right was originally appropriated."

ISF Rule 8.00 was a compromise between the CWCB, environmental interests, and the water development community. No formal challenges were made to the adopted ISF Rules, and ISF Rule 8.00 has not been revised since its original adoption, except that it is now renumbered as Rule 7.00.

### *ii. Issues Raised in Public Rulemaking Process*

As one would expect, various interest groups' positions on inundation covered a wide range, with the extremes summarized here very briefly. Water development advocates asserted that inundation is never injury, that the Board has no statutory authority to prevent inundation, and that the proposed rule constituted a "taking." Environmental advocates contended that inundation always constitutes injury to an ISF water right and that the Board has no statutory authority to allow such injury.

During the public review period for the proposed rules, some members of the water development community questioned the constitutionality of the rule regarding inundation. At the CWCB's request, the Attorney General's Office opined on the issue finding that the proposed rule on inundation was within the scope of the statutory authority delegated to the CWCB by the General Assembly in establishing the ISF Program, and that the CWCB could not accomplish the mission of the ISF Program without the ability to protect its ISF water rights from proposed actions that would defeat the purpose for which the ISF water rights were appropriated.

## 2. Adoption of the CWCB's First Instream Flow Rules

After considering all of the public input and legal opinions of the Attorney General's Office, the Board adopted the ISF Rules, including Rule 8.00. The CWCB recognized both dewatering and inundation as potential injuries to an ISF water right.

The process leading up to the adoption of the ISF Rules in 1993 included legal analyses of whether inundation of an ISF water right constituted injury. Dewatering of the stream had always been acknowledged as an injury against which the CWCB could protect. Water development advocates argued that

dewatering was the only type of injury that Colorado water rights are entitled to prevent, and that in *Colorado River Water Conservation District v. Colorado Water Conservation Board* (“the Crystal River case”), the Colorado Supreme Court recognized dewatering as the only type of injury that the ISF Program was designed to prevent.

In response to this argument, the Attorney General’s Office agreed that the Colorado Supreme Court had explicitly recognized dewatering as injury to an ISF water right, but that prevention of dewatering is not the only protection available to ISF water rights. In that case, the Colorado Supreme Court had also stated that technical questions regarding administration of the ISF Program were best determined by the CWCB, “an administrative agency which may avail itself of expert scientific opinion.” The Attorney General’s Office concluded that if scientific evidence indicated that inundation would harm or destroy the natural environment protected by an ISF water right, the CWCB could rely upon the Crystal River case to support its ability to protect an ISF water right from the injury resulting from such an inundation.

In the Crystal River case, the Colorado Supreme Court had described the CWCB’s authority to appropriate ISF and natural lake levels as involving “. . . only that part of the natural environment where survival is affected by stream flow and lakes.”<sup>99</sup> This supports the conclusion that the beneficial use of an ISF water right is to protect a stream reach where species’ survival is affected by stream flow. Inundating that reach of stream could result in denying the CWCB the beneficial use of its ISF water right because the purpose of the original appropriation would be defeated. Denying the holder of a water right the beneficial use of that right can constitute injury even when the volume of the water right is not diminished.

C. THE *ASPEN WILDERNESS* CASE AND ITS REVERBERATIONS: THE  
CWCB HAS A FIDUCIARY DUTY TO THE PEOPLE OF COLORADO TO  
APPROPRIATE ISFs TO PRESERVE THE NATURAL ENVIRONMENT TO A  
REASONABLE DEGREE AND TO PROTECT ITS WATER RIGHTS

In 1995, the Colorado Supreme Court determined that the CWCB acts in a fiduciary capacity on behalf of the people of Colorado in its appropriation and protection of ISF water rights. The case began in 1992, when the CWCB acted unilaterally in decreasing the amount of water appropriated for an ISF water right on Snowmass Creek after hearing evidence and oral presentations. In its ruling on an appeal of this decision by the Aspen Wilderness Workshop, a conservation group, the Denver District Court held that “the Conservation Board was acting within its inherent power to rectify errors and its implied authority to modify its appropriation on Snowmass Creek; that the Board, as any holder of a water right, need not enforce its rights and may voluntarily not use that portion of its decreed water rights in excess of the amount needed; and that any such corrective modification did not require adjudication by the water court.”<sup>100</sup> On appeal to the Colorado Supreme Court, the CWCB argued that

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99. *Colo. River Water Conservation Dist.*, 594 P.2d at 576.

100. *Aspen Wilderness Workshop, Inc. v. Colo. Water Conservation Bd.*, 901 P.2d 1251, 1256 (Colo. 1995).



it had acted within its legislatively prescribed authority by unilaterally modifying its appropriation.<sup>101</sup> The Colorado Supreme Court rejected the lower court's ruling and the CWCB's argument, holding that section 37-92-102(3) creates a right for the CWCB to appropriate ISF water rights, but "burdens the actions of the Board by creating a unique statutory fiduciary duty between the Board and the people of this state so that the Board may only appropriate a particular amount of water, i.e., the minimum amount necessary to preserve the natural environment."<sup>102</sup>

The court held that the CWCB cannot "unilaterally modify its appropriation contrary to a lawful order of the water court, i.e., the June 5, 1980 decree, especially since the decree was issued on the Board's application."<sup>103</sup> In light of that water court decree, the CWCB was required to return to water court to modify the decree in order to reduce its ISF appropriation on Snowmass Creek.<sup>104</sup>

1. In 1996, the General Assembly Enacted Senate Bill 96-64 ("S.B. 64") in  
Reaction to the Aspen Wilderness Case

After the *Aspen Wilderness* ruling, the General Assembly enacted S.B. 64 to require, among other things, a process for modifying (decreasing) ISF water rights that includes a public notice and comment procedure and a subsequent filing in water court to modify the ISF decree. S.B. 64 also clarified the water court's role in the adjudication of ISF water rights, providing that judicial review of the Board's determinations under sections 37-92-102(3)(c) and (4)(d) would be based on the Board's administrative record using the criteria of the Colorado Administrative Procedures Act. S.B. 64 also provided that the Board may file applications for changes of water rights and augmentation plans, and the water court will determine matters that fall within the scope of section 37-92-305. S.B. 64 reaffirmed the CWCB's authority to exercise its discretion in appropriating ISF water rights, attaching conditions to ISF appropriations, and entering into stipulations and other agreements that it determines will preserve the natural environment to a reasonable degree. Finally, S.B. 64 provided that the Board must make any increase to an existing ISF water right as a new appropriation, and confirmed the use of the ISF Program to recover endangered species.

Regarding these provisions, Senator Tom Norton, sponsor of S.B. 64, stated that the bill authorized the CWCB to conduct a "notice and comment" proceeding to appropriate ISF rights and stated that ISF appropriations "are neither rulemaking, nor adjudicatory in nature."<sup>105</sup> Senator Norton also stated that the CWCB's process of appropriating an ISF involves "administrative consideration" and "is not rulemaking or adjudication but, rather, is the exercise of sound agency discretion."<sup>106</sup>

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101. *Aspen*, at 1256.

102. *Aspen*, at 1256-7.

103. *Aspen*, at 1259.

104. *Id.*

105. Statement of Senator Tom Norton Regarding S.B. 64, Jan. 17, 1996, at 3.

106. Floor Statement of Senator Tom Norton Regarding S.B. 64, Jan. 22, 1996, at 1-2.

## 2. ISF Rules Revisions in 1998 and 1999

The *Aspen Wilderness* ruling and the enactment of S.B. 64 prompted the CWCB to adopt procedures in 1997 ("1997 Procedures") for appropriating ISF water rights. The CWCB amended the ISF Rules in 1998 and 1999 to include the 1997 Procedures. The 1997 Procedures described three phases of ISF appropriations: (1) Coordination, Planning and Field Data Collection; (2) Staff Review and Processing; and (3) Public Review and Comment and Board Action.<sup>107</sup>

In 1998, after a public rulemaking hearing and consideration of numerous public comments, the CWCB revised the ISF Rules that addressed new ISF appropriations, modifications of ISF water rights, and public notice. The CWCB also adopted a new rule that grandfathered the 1997 Procedures as being adopted pursuant to this new rule.<sup>108</sup> The most significant change affected by this rulemaking was the revision of ISF Rule 10.00 (Modification of ISF Rights) to implement the procedures required and established by S.B. 64.

In 1999, the CWCB repealed ISF Rule 5.00 (Original Appropriation Procedure) in its entirety and adopted a new ISF Rule 5.00 to establish a public notice and comment procedure for ISF water right appropriations that the Board still uses today. The new ISF Rule 5.00 created procedures, parameters and requirements for contesting a proposed ISF appropriation, clarified interested parties' rights and responsibilities, and established procedures for pre-hearing conferences and hearings on contested ISF appropriations that include deadlines and document submission requirements.<sup>109</sup> The rule also established an annual schedule for initiating, processing and appropriating ISF water rights, changed notice requirements including the establishment of Instream Flow Subscription Mailing Lists, and provided for informal public notice and comment occurring before and after the Board declares its intent to appropriate.<sup>110</sup> In the 1999 rulemaking proceeding, the CWCB also amended ISF Rule 10.00 to clarify the public review processes that apply to modifications under the Recovery Implementation Program, to modify requirements of written determinations of the Board, and to expand the public review process for modifications.<sup>111</sup>

### D. EXAMPLES OF CWCB PARTNERING WITH WATER COMMUNITIES IN THE 1990S

#### 1. 1993—Little Dry Creek

Little Dry Creek is a small tributary to the South Platte that flows through Cherry Hills Village and Greenwood Village in the southeast Denver metro

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107. See "Procedures for New Instream Flow Appropriations," May 2, 1997.

108. See "Notice of Rulemaking Hearing Before the Colorado Water Conservation Board," dated November 25, 1997, and "Opinion of the Attorney General Rendered in Connection with the Rules Adopted by the Colorado Water Conservation Board," dated March 12, 1998.

109. See "Notice of Public Rulemaking Hearing Before the Colorado Water Conservation Board," dated July 30, 1999; Statement of Basis and Purpose, Amendments to the Rules Concerning the Colorado Instream Flow and Natural Lake Level Program, 2 CCR 408-2 (1999).

110. *Id.*

111. *Id.*

area. Local residents initiated the request for an ISF appropriation and participated in the data collection efforts, which resulted in an ISF water right on Little Dry Creek.<sup>112</sup> The natural environment protected by the Board's appropriation includes a warm water fishery and a unique riparian zone in a predominantly urban watershed.

## 2. 1994—Cherry Creek

At the request of the Colorado Division of Parks and Outdoor Recreation, the CWCB secured an ISF appropriation on Cherry Creek as it flows through Castlewood Canyon State Park southeast of Denver.<sup>113</sup> The environment protected by the CWCB's appropriation is characterized by a warm-water fishery and unique riparian zone.

## 3. ISFs for Endangered Species Recovery Programs

### *i. Upper Colorado River Recovery Program*

Flow protection is a vital component of the Recovery Program. The In-stream Flow Program provides one of the principal mechanisms to accomplish Recovery Program goals. The Board has appropriated ISFs on the 15-Mile Reach of the Colorado River and acquired water for the critical habitat reach on the Yampa River. Progress toward recovery has allowed numerous Colorado water projects to advance through the Fish and Wildlife Consultation Process with "non-jeopardy" opinions, by which the U.S. Fish and Wildlife Service determines that such actions will not jeopardize the existence of any listed species.

### *ii. Cooperation with Federal Agencies*

The U.S. Bureau of Land Management ("BLM") has been actively involved in recommending streams for ISF appropriations. To date, the BLM has recommended and the CWCB has appropriated over 100 ISF water rights on streams across the state that flow through BLM land. In 1993, the BLM donated an interest in a senior water right on Cathedral Creek, near Rangely, to the CWCB for ISFs.<sup>114</sup>

A highlight of this productive federal/state partnership is the CWCB's appropriation of ISF water rights recommended by the BLM on Big Dominguez Creek and Little Dominguez Creek in the Dominguez Canyons Wilderness Area.<sup>115</sup> The appropriations were for all of the annually available flows, minus a small development allowance for private parcels and lands owned by the BLM and the U.S. Forest Service within the two watersheds. These ISF appropriations were the culmination of an extensive collaborative process that started with garnering local support for the wilderness designation itself. A diverse group of stakeholders, including the Colorado River Water Conservation District, the Wilderness Society, and the BLM developed water protection language for the

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112. See Case No. 93CW100, Water Division 1.

113. See Case No. 94CW246, Water Division 1.

114. See Case No. 04CW191, Water Division 5.

115. See Case Nos. 10CW185 and 10CW185, Water Division 4.

proposed wilderness legislation that relied on the state to protect wilderness area streams, rather than establishing a federal water right for that purpose.

The Dominguez Canyon Wilderness Area was created on March 30, 2009 as part of the 2009 Omnibus Public Lands Management Act (“Act”).<sup>116</sup> The Wilderness Area is contained within the Dominguez-Escalante National Conservation Area (“NCA”), also created by the Act. The legislation provided an opportunity for the CWCB to appropriate ISF water rights to support wilderness management purposes in lieu of creating a federal water right for wilderness management purposes. The stated purpose of the Act, among other things, is to “conserve and protect for the benefit and enjoyment of present and future generations . . . the water resources of area streams, based on seasonally available flows, which are necessary to support aquatic, riparian, and terrestrial species and communities.”<sup>117</sup> The Act provides that the Secretary of the Interior “may appropriate and seek adjudication of water rights to maintain surface water levels and stream flows on and across the Wilderness to fulfill the purposes of the Wilderness.”<sup>118</sup> However, the Act goes on to provide that the Secretary “shall not pursue adjudication of any Federal instream flow water rights if . . . the Secretary determines, upon adjudication of the water rights by the Colorado Water Conservation Board, that the Board holds water rights sufficient in priority, amount and timing to fulfill the purposes of the Act.”<sup>119</sup> The stakeholders who had worked on the legislative language also worked together on a proposed approach for the CWCB to take in appropriating the water rights. The Board’s staff and certain stakeholders conducted widespread public outreach that resulted in no formal objections to and numerous expressions of support for these ISFs. This was the first time in Colorado that wilderness legislation explicitly provided that the federal government would rely upon the state’s ISF Program to meet its water resource protection goals.

The U.S. Forest Service (“USFS”) has recommended and the CWCB has appropriated several ISFs on streams that flow through USFS lands. The most notable example is the CWCB’s 1996 appropriation of ISF water rights on East Fork Dead Horse Creek, West Fork Dead Horse Creek, and Dead Horse Creek for all the unappropriated flow, and a natural lake level water right on Hanging Lake, into which Dead Horse Creek flows.<sup>120</sup> The CWCB based these appropriations upon the unique hydrologic and geologic natural environment associated with the Dead Horse Creek watershed, including Bridal Veil Falls and Hanging Lake.<sup>121</sup>

Specific aspects of the unique natural environment included black swifts, a bird species that lives in mists behind waterfalls, and the riparian community

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116. Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11, 123 Stat. 991.

117. 123 Stat. 991, 1102, Sec. 2402(b)(2).

118. 123 Stat. 991, 1105, Sec. 2405 (h)(2)(B)(ii)(II).

119. 123 Stat. 991, 1106, Sec. 2405 (h)(2)(E)(i).

120. See Case Nos. 96CW350, 96CW351, 96CW352, and 96CW353; Water Division 5.

121. See November 18, 1996 Memorandum to Colorado Water Conservation Board Members from Dan Merriman entitled “Agenda Item 20.a, November 25-26, 1996 Board Meeting – Instream Flow Program – Final Notice Water Division 5; Garfield County” and attachments.

that includes rare sullivania, commonly referred to as coolwort, yellow columbine, and red-osier dogwood thickets.<sup>122</sup> In its letter transmitting its recommendation and supporting technical reports, the USFS stated, “These geologic, hydrologic, and biotic factors combine with limited disturbance to create a unique natural environment that does not occur anywhere else in the State.”<sup>123</sup> Due to steadily increasing numbers of people hiking up the Hanging Lake Trail, accessible from Glenwood Canyon, to see Hanging Lake, this year the USFS started requiring reservations and permits to visit Hanging Lake.<sup>124</sup>

## VI. THE BUSY 2000’S

This decade was very busy for the CWCB’s ISF program. Six new bills were passed by the General Assembly that clarified, modified, and in some instances expanded the scope of the ISF program in response to the 2002 drought to allow for a quick procedure for CWCB to lease water for instream needs. One important Colorado Supreme Court opinion helped to protect ISF water rights from other water users’ augmentation by exchange plans. As explained above, in 2009, the CWCB provided a full update and replacement of the ISF rules, which remains the official Rules of the program today in 2019.

### A. IN 2002, THE GENERAL ASSEMBLY PASSED SENATE BILL 156 TO EXPAND THE CWCB’S ABILITY TO USE ACQUIRED WATER

In 2002, the General Assembly promulgated Senate Bill 156 (“S.B. 156”) to expand the CWCB’s authority to acquire water, water rights, or interests in water “to preserve” the natural environment to allow acquisitions of such water “to preserve or improve” the natural environment to a reasonable degree.<sup>125</sup> S.B. 156 provided an opportunity for the CWCB to accomplish more with water acquired from willing sellers or donors, including restoring or rehabilitating degraded streams.

However, as introduced by Senator Ken Gordon in 2002, S.B. 156 was quite different from the version signed by Governor Bill Owens. As introduced, S.B. 156 created an exception to the CWCB’s exclusive authority to obtain decrees for ISF and natural lake level water rights by authorizing owners of absolute water rights to apply to water court to change those water rights to a “plan for instream use.”<sup>126</sup> S.B. 156 defined “plan for instream use” as “a detailed program to change the use of an existing absolute water right to provide flows between specific points in natural streams or levels of lakes to sustain or enhance uses for recreation, fish and wildlife, scenic beauty, or ecological purposes.”<sup>127</sup> S.B. 156 also required an application for a plan for ISFs to be submitted to the CWCB and authorized the Board to submit comments on whether such plan would “result in any new limitations or impairments on the

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122. See November 20, 1996 letter from Jim Maxwell, Water Program Leader of the Rocky Mountain Region of the USFS, to Dan Merriman (attached to memo cited in FN 8).

123. *Id.*

124. <https://www.visitglenwood.com/hanginglake/>.

125. S.B. 02-156: Change of Water Rights to Instream Use, ch. 149, § 37-92-102 (3), Colo. Session Laws 445-6.

126. S.B. 02-156, Introduced Version (January 28, 2002).

127. *Id.*

State's ability to develop fully and beneficially use its entitlements to water under interstate compacts or equitable apportionment decrees.<sup>128</sup> Finally, S.B. 156 prohibited the water court from entering a decree for a plan for ISFs unless the court found that the plan: (1) would not impair the state's ability to fully develop and beneficially use its compact entitlements; and (2) could be administered without significant additional cost to the state.<sup>129</sup>

Not surprisingly, the idea of allowing others to use water for ISFs was contentious. The Northwest Colorado Council of Governments, Trout Unlimited, Environmental Defense, and others supported the bill, citing, among other things, limitations of the state's ISF Program and a desire for more flexibility in the use of existing water rights.<sup>130</sup> Opponents of S.B. 156 included the Northern Colorado Water Conservancy District, Colorado Water Congress, and the Colorado Farm Bureau.<sup>131</sup> Bill opponents voiced concerns about potential consequences of allowing individuals to hold ISF water rights, expressing a preference for maintaining the CWCB's exclusive authority to hold such rights.<sup>132</sup> Numerous discussions led to a compromise approach that resulted in major amendments to S.B. 156 that eliminated the possibility of private ISFs, and instead expanded the CWCB's authority to allow it to use acquired water, water rights, and interests in water to preserve or to improve the natural environment to a reasonable degree. The final version of S.B. 156 also prohibited the CWCB from accepting a donation of water rights that would require the removal of existing infrastructure without the approval its current owner. Finally, it authorized the CWCB to use any funds available to it, other than the CWCB Construction Fund, for acquiring water rights and converting them to ISFs.<sup>133</sup>

The CWCB amended the ISF Rules in March 2003 to implement S.B. 156. The primary amendments were to ISF Rule 6.00, which governs acquisitions of water, water rights, and interests in water for ISFs.<sup>134</sup> Amended ISF Rule 6.00 identified factors that the Board will consider when determining whether to acquire water, water rights, or interests in water, and established procedures for notice, public input, and if necessary, hearings.<sup>135</sup> As with most rulemakings, the CWCB also amended other rules for purposes of clarification, editorial revisions, and updating.<sup>136</sup> The Colorado Farm Bureau, Trout Unlimited, and the U.S Bureau of Land Management submitted comments on the proposed rule amendments that informed the final version of the amended rules.

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128. *Id.*

129. *Id.*

130. Staff Summary Meeting, Senate Committee on Judiciary, dated February 13, 2002, pp. 10-11.

131. *Id.*

132. *Id.*

133. S.B. 02-156: Change of Water Rights to Instream Use, ch. 149, § 37-92-102(3), Colo. Session Laws 445-6.

134. *See* "Notice of Rulemaking Hearing Before the Colorado Water Conservation Board," dated December 20, 2002, and "Opinion of the Attorney General Rendered in Connection with the Rules Adopted by the Colorado Water Conservation Board on March 24, 2003," dated April 7, 2003.

135. *Id.*

136. *See* "Notice of Rulemaking Hearing Before the Colorado Water Conservation Board," dated December 20, 2002.

B. IN 2003, THE GENERAL ASSEMBLY ENACTED HOUSE BILL 1320 TO AUTHORIZE TEMPORARY LOANS OF WATER RIGHTS FOR ISF USE DURING TIMES OF DROUGHT OR OTHER EMERGENCY

Colorado experienced severe drought conditions in 2002, with the most intense period of drought occurring in the month of July.<sup>137</sup> That year, water rights owners offered water to the CWCB for temporary ISFs. The Division of Wildlife contacted the CWCB in early July with concerns about the native fishery on the White River near the Town of Meeker, where the CWCB holds an ISF water right decreed in 1977 for 200 cfs. Flows had dropped to 100 cfs, severely stressing the fishery. The Division of Wildlife wanted to make emergency releases from Lake Avery to supplement flows with the intent that the CWCB would protect the released water under its ISF water right. However, when the CWCB coordinated with the Division of Water Resources (“DWR”) on how to administer such a release past headgates in the reach, it became apparent that the arrangement could not work because the stored water was not decreed for ISFs by the CWCB. Additionally, because the Division’s water right was decreed for storage and not direct flow use, releases would be subject to diversion by downstream users.

Another example occurred in August of 2002, when flows in the Roaring Fork River were critically low, with some completely dry reaches. The City of Aspen, concerned about flows downstream from the Salvation Ditch diversion, negotiated an agreement with the ditch company to bypass water at its headgate. The City intended to convey temporarily the water to the CWCB to supplement its ISF water rights on the Roaring Fork River. While the CWCB was interested in accepting and using the water, the City and the CWCB, in consultation with the DWR, could not determine an appropriate legal mechanism by which the CWCB could quickly obtain approval of a temporary change of the loaned water for ISFs. All involved concluded that a new tool was needed to address this gap in the CWCB’s ability to accept and use water voluntarily offered to supplement critically low flows on ISF reaches.

In 2003, two legislators introduced competing bills to authorize temporary loans of water for ISFs. Senator Jim Isgar, a Democrat from Durango, introduced Senate Bill 085 (“S.B. 085”), which would authorize the State Engineer to approve loans of water rights to the CWCB for up to 120 days for ISFs during a drought upon a finding of no injury to other water rights. S.B. 085 also authorized agricultural water users to loan water to other agricultural water users on the same stream. After much discussion with and input from the Colorado Water Congress State Affairs Committee and other interested parties, the Senate State Affairs Committee passed the bill, paving the way for approval by the full Senate. Then Representative Gregg Rippey, a Republican from Glenwood Springs, introduced House Bill 1320 (“H.B. 1320”), which was almost identical to S.B. 085. The main differences between the two bills were that H.B. 1320 required a governor-declared drought emergency or other type of emergency to be in place to allow temporary loans and did not address agriculture-to-agriculture loans of water. Both bills amended section 37-83-105 of the Colorado

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137. National Integrated Drought Information System, “Drought in Colorado,” <https://www.drought.gov/drought/states/colorado>.

Revised Statutes, which previously had solely addressed loans of water among agricultural water users.

Both bills passed, and on May 22, 2003, Governor Bill Owens vetoed S.B. 085, citing inconsistencies between the two bills and characterizing H.B. 1320 as authorizing temporary loans of water for ISFs “under more carefully defined circumstances,” which addressed concerns expressed during the legislative session that temporary ISF loans should be authorized only in drought or other emergencies. Governor Owens signed H.B. 1320 in June of 2003. Notwithstanding the political drama, the 2003 legislative session resulted in a valuable tool for the Instream Flow Program to respond quickly to offers of water to address low-flow conditions. Subsequent legislation refined this tool in 2005 and 2007.

In July 2004, the CWCB amended ISF Rule 6.g to incorporate the provisions of H.B. 1320 and amended ISF Rule 6.i to allow for a more expedited notice and comment procedure when needed for acquisitions of water for ISFs.<sup>138</sup>

C. IN 2005, THE GENERAL ASSEMBLY ENACTED HOUSE BILL 1039 TO REFINES FURTHER THE CWCB’S AUTHORIZATION TO ACCEPT TEMPORARY LOANS OF WATER RIGHTS

On January of 2005, Representative Kathleen Curry introduced House Bill 1039 (“H.B. 1039”), which both expanded and limited conditions under which temporary loans for ISFs could be made to the CWCB. H.B. 1039 removed the limitation that temporary loans could only be made during a governor-declared drought emergency, but also limited the operation of temporary loans to three years out of a ten-year period. Additionally, the bill provided for a second ten-year period if the loan was not exercised during the initial ten-year period and provided a process for parties to submit comments to the State Engineer on potential injury to such party’s water rights after each year a loan is exercised. Representative Curry stated that the drought declaration requirement involved a “fairly rigorous process,” and that she proposed the bill to provide “more flexibility on a local level” for implementing temporary loans.<sup>139</sup> In November 2005, the CWCB amended ISF Rule 6.g to incorporate the provisions of H.B. 1039.<sup>140</sup>

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138. See “Notice of Rulemaking Hearing Before the Colorado Water Conservation Board,” dated April 14, 2004, and “Opinion of the Attorney General Rendered in Connection with the Rules Adopted by the Colorado Water Conservation Board on July 1, 2004,” dated August 3, 2004.

139. Statement of Representative Curry, Transcript of House Agriculture, Livestock, and Natural Resources Committee, Colo. House Bill 1039, January 24, 2005.

140. See “Notice of Public Rulemaking Hearing Before the Colorado Water Conservation Board,” dated August 17, 2005.



D. THE 2006 *CENTRAL CITY V. CWCB* SUPREME COURT OPINION  
PROTECTED ISFs (AND OTHER JUNIOR NON-CONSUMPTIVE USES,  
INCLUDING EXCHANGES) FROM INJURY DUE TO PLANS FOR  
AUGMENTATION

The *Central City*<sup>141</sup> decision was a victory for the protection of ISF water rights, exchange water rights, and other junior water rights from injury. The decision extended the well-settled law that protects junior water right from injurious changes of senior water rights to also include protection for junior water rights against exchanges and augmentation plans of senior water rights. Such injury can result from both change cases and augmentation plans by expansion of use of a senior water right that alters the stream conditions to the detriment of junior water rights within the altered reach.

This victory culminated from a decade-long water court challenge to protect ISF water rights. CWCB's position in the case was supported by DWR, Colorado River Water Conservation District, Southeastern Water Conservancy District, the Northern Colorado Water Conservancy District, and Trout Unlimited, all of which filed briefs in support of the CWCB.<sup>142</sup> When the underlying application was filed in 1992, augmentation plans were a relatively new mechanism being used in Colorado under the '69 Act, but in some ways are similar to the oft-used mechanism for changes of water rights. The court noted that the '69 Act "set forth procedures and standards for 'adapting' existing water right to new uses through changes of water rights, plans for augmentation, and exchanges."<sup>143</sup> All three mechanisms of "adapting" existing water rights can change stream conditions that can impact other water uses on the stream. As the court explained, section 37-92-305 provides an injury standard for the courts to protect all *vested water rights* (not just senior rights) and requires consideration of historical use to prevent enlargement of a senior right against junior rights.<sup>144</sup> The court also noted the specific statutory direction applicable only to plans for augmentation that the state engineer shall curtail out-of-priority ("OOP") "diversions that deplete streamflow and are not replaced to prevent injury to vested water rights."<sup>145</sup> Again, the court emphasized the reference to "vested" water rights, further reinforcing the application of the statutory injury standard to *all* vested water rights, whether senior or junior to the underlying water right that is being "adapted." The emphasis on vested rights was key to the case because applicants had proposed, and obtained in the water court decree, a term that would have only protected rights senior to the underlying rights that were being augmented by Central City.

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141. *Colorado Water Conservation Bd. v. City of Central*, 125 P.3d 424 (Colo. 2005) ("*Central City*").

142. 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). The State Engineer and the Division Engineer for Water Division 1 were appellants in the *Central City* appeal, and jointly filed briefs supporting the position of the CWCB. The Colorado River Water Conservation District, the Southeastern Colorado Water Conservancy District, the Northern Colorado Water Conservancy District, Trout Unlimited and others filed *amicus curiae* briefs in support of the CWCB.

143. *Central City*, at 435.

144. *Central City*, at 438; § 37-92-305.

145. *Central City*, at 438; § 37-92-305(8).

The court confirmed once again that an ISF water right is vested and is to be administered no differently than any other appropriative rights.<sup>146</sup> The court also confirmed that a junior appropriator has a vested right to stream conditions at the time of the junior appropriation against adaptations by senior appropriators.<sup>147</sup>

However, the court had a few more questions to clarify before arriving at the ultimate holding. Remaining questions before the court included: (1) how to effectuate a decree term allowing a junior to call out an augmentation plan for an underlying senior diversion; (2) whether the non-injury requirement extends to ISF water rights' protection against not just changes, but also plans for augmentation; (3) whether certain types of junior water rights can operate during a downstream senior call; and (4) whether this plan for augmentation includes an exchange under the "plan for augmentation, including exchange" authority described in section 37-92-305(3). The court's opinion addressed each of these issues in order. First, it recognized that "a plan for augmentation operates outside of the priority system and therefore operates out of priority."<sup>148</sup> Thereby, once the underlying senior depletive water right is called out by a downstream senior, any diversion and resulting depletion that is then made pursuant to an augmentation plan is made out of priority, not pursuant to its underlying senior right. Therefore, any vested operating water right downstream becomes senior to the diversion which is now out of priority operating only pursuant to the augmentation plan.

This brings us to the next two questions the court needed to address: Is an ISF water right due legal protection against injury from an augmentation plan? And how can a vested water right operate during a downstream call? After providing a brief background of the law governing ISF water rights, the court held that an ISF has a right to assert an injury claim against augmentation plans,<sup>149</sup> extending the previous ruling that an ISF has a right to assert injury

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146. *Central City*, at 437-8 ("...instream flow or lake level rights are no different in concept from other appropriative rights. They must be decreed to be administered; are given a fixed priority date, a specified flow rate or volumetric quantity, time and place of use; and are administered like any other water right, but no means of diversion is required.")

147. "This court has often said, in substance, that a junior appropriator of water to a beneficial use has a vested right, as against his senior, in a continuation of the conditions on the stream as they existed at the time he made his appropriation." *Central City*, at 434; citing *Vogel v. Minn. Canal & Res. Co.*, 107 P. 1108, 1111 (1910); *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1, 80 (Colo.1996); *Farmers Highline Canal & Reservoir Co. v. City of Golden*, 272 P.2d 629, 631-32 (1954) (junior appropriators have vested rights in the continuation of stream conditions as they existed at the time of their respective appropriations); *Faden v. Hubbell*, 28 P.2d 247, 251 (1933) ("A junior appropriator of water to a beneficial use has a vested right, as against his senior, in a continuation of the conditions on the stream as they existed at the time he made his appropriation."). "It has long been the rule that a senior water right adapting to a new or enlarged use through a change of water right proceeding may do so only if it does not injure senior or junior users. This noninjury requirement derives from the longstanding tenet of water law that a junior appropriator is entitled to expect that stream conditions existing at the time of appropriation will be maintained." *Central City*, at 439 (citations omitted).

148. *Central City*, at 435, citing *Empire Lodge*, 39 P.3d 1139, 1154 (Colo. 2001).

149. "Thus, a junior instream flow right may resist all proposed changes in time, place, or use of water from a source which in any way materially injures or adversely affects the decreed minimum flow in the absence of adequate protective conditions in the change of water right or augmentation decree. *Central City*, at 440; see *Weibert*, 618 P.2d at 1372; Daniel S. Young, *Developing a Water Supply in Colorado: The Role of an Engineer*, 3 U. Denv. Water L.Rev. 373, 386

against a change of water right.<sup>150</sup> As to the operation of a junior water right during a downstream call, the court pointed out that an ISF water right is an “in-place right to the use of water.”<sup>151</sup> While commanding the decreed flow rate in the stream between the upstream and downstream termini, the ISF water right operates non-consumptively through a reach of stream, similar to an exchange or other non-consumptive uses, such as a hydropower right or a flow-through pond. During a downstream call, whether these types of water rights are operating or not, whether by diversion and replacement or simply within the stream, no water would be yielded to a calling water right’s diversion downstream of the lower terminus by curtailing the non-consumptive use. Therefore, the non-consumptive uses are allowed to continue to operate during the downstream call without an augmentation plan and without curtailment.

This leads to the final question regarding whether the augmentation plan is operating by exchange. An augmentation plan, as generally and currently implemented, is designed to allow OOP diversions, so long as other water is being provided to replace the river depletions to a calling water right. In some instances, the replacement water is provided at or upstream of the OOP diversion, which makes the river whole in time, place, and amount above any calling water rights. In other instances, augmentation plans are designed to provide the replacement water to the stream system at some point downstream of the OOP diversion. So long as the replacement water is introduced above the calling water right, the plan should work. However, the senior calling water right that triggers the plan for augmentation can be miles below the diversion that has now become an OOP diversion. The court recognized that subsection (5) of section 37-92-305 provides an injury standard that allows “plans for augmentation including exchange” to occur when a supplier takes “an equivalent amount of water at his point of diversion or storage if such water is available without impairing the rights of others.”<sup>152</sup> The definitions of change of water right and plan for augmentation include water right exchanges.<sup>153</sup> A water right exchange is a trade of water between structures or users administered by the state engineer.<sup>154</sup> It involves four critical elements: “(1) the source of substitute supply must be above the calling water right; (2) the substitute supply must be equivalent in amount and of suitable quality to the downstream senior appropriator; (3) there must be available natural flow at the point of upstream diversion; and (4) the rights of others cannot be injured by the exchange.”<sup>155</sup> Because the diversion is upstream, and the substitute supply provided downstream, exchanges reduce the amount of water within the specific stream reach lying between the upstream

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(2000).

150. “We hold the noninjury requirement applicable to changes of water rights also applies to augmentation plans affecting instream flow rights. We likewise hold that an adjudicated instream flow right entitles its holder to maintain the stream conditions existing at the time of its appropriation and to resist proposed developments through changes of water rights or augmentation plans, regardless of the means, that in any way materially injure instream flow rights.” *Central City*, at 440.

151. *Central City*, at 437.

152. *Central City*, at 437.

153. Colo. Rev. Stat. § 37-92-103(9) (2006).

154. Colo. Rev. Stat. §§ 37-83-104; 37-80-120(2)-(4) (2006).

155. *Empire Lodge Homeowner’s Ass’n v. Moyer*, 39 P.3d 1139, 1155 (Colo. 2001).

diversion and the downstream introduction of substitute supply.<sup>156</sup> In the *Central City* case, “the exchange reach extends from the two augmentation stations as the downstream terminus to the points of diversion and storage as the upstream terminus.”<sup>157</sup> Thus, “the Court concluded that the exchange included within the city’s augmentation plan had to be operated in priority vis-à-vis the entire stream system, and administered as against all other water rights.”<sup>158</sup>

Although this case does appear to tackle a complex issue with a complex holding, it is actually rather simple. The holding is that all vested water rights, including ISF water rights, have a right to stream conditions at the time of appropriation, and a later court-approved adaption or modification of senior water rights cannot change stream conditions to the detriment of junior appropriators. It is a simple concept that required multi-step legal analyses to provide the clearly articulated holding in the *Central City* opinion.

#### E. IN 2007, THE GENERAL ASSEMBLY ENACTED HOUSE BILL 1012 TO REFINE FURTHER THE CWCB’S AUTHORIZATION TO ACCEPT TEMPORARY LOANS OF WATER RIGHTS

In 2007, Representative Frank McNulty introduced House Bill 1012 (“H.B. 1012”) to address two potential concerns of water rights owners interested in temporarily loaning their water rights while maintaining the value of those water rights. H.B. 1012 provided two significant forms of protection of temporarily loaned water rights by: (1) excluding all periods of time during which a loaned water right is used by the CWCB for ISFs from any historical consumptive use analysis of the loaned water right; and (2) exempting such non-consumptive use from raising a presumption of abandonment. H.B. 1012 removed two potential deterrents to loaning water to the CWCB for ISFs and provided certainty to water rights owners that the value of their water rights would be maintained while the CWCB used those water rights non-consumptively.

#### F. IN 2008, THE GENERAL ASSEMBLY ENACTED HOUSE BILL 1280 TO EXTEND PROTECTIONS TO WATER RIGHTS OWNERS WHO LEASE WATER TO THE CWCB FOR INSTREAM FLOW USE

Following in the footsteps of HB 1012, House Bill 1280 (“H.B. 1280”) established similar protections for water rights owners who lease or loan water on a long-term basis to CWCB for ISF use. Under most lease agreements and other agreements providing water to the CWCB for ISFs, the water right owner retains ownership of and the ability to use the subject water right for its original decreed use. In 2008, the potential loss of value of the original water right emerged as a potential stumbling block for lease transactions.<sup>159</sup> The potential decrease in the value of such water rights arose due to the non-consumptive nature of ISFs. If a water rights owner who previously had leased water to the

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156. *City of Florence v. Board of Waterworks of Pueblo*, 793 P.2d 148, 149 (Colo. 1990).

157. *Central City* at 428.

158. John J. Cyran, “The City of Central Decisions and the Future Administration of Colorado Water Rights,” 10 West. Water L. & Pol’y Rptr. 151-156 (Apr. 2006); citing *Central City*, at 442.

159. CWCB Fact Sheet, entitled “HB 08-1280 – Concerning Protection of Water Rights Used by the CWCB for Instream Flows Under Contracts with Water Rights Owners,” January 2008.

CWCB for ISFs subsequently decided to apply to water court to change the underlying water right, under the law in 2008, periods of zero diversions and no consumptive use would be counted when establishing the historical use of the water right which, in turn, determines the value of that water right.<sup>160</sup> House Bill 1280 was enacted to prevent such a potential decrease in the value of water rights leased to the CWCB for ISFs.

H.B. 1280 provided that leasing or loaning water to the CWCB for ISFs will not result in a reduction of the historical consumptive use credited to the subject water right in any future water court proceeding to change that water right.<sup>161</sup> H.B. 1280 also eliminated the presumption of abandonment for water rights that are the subject of a contract with the CWCB that allows the CWCB to use all or part of a water right for ISFs.<sup>162</sup> While those were the primary components of the bill, as it wound its way through the legislative process, other provisions were added to address concerns expressed by the water community. As amended, H.B. 1280 included a requirement that the CWCB adopt criteria for evaluating proposed leases and loans of water for ISFs addressing public notice, the extent to which the leased or loaned water will benefit the natural environment, and calculation of compensation to be paid to the lessor based upon the use of the water after the term of the lease.<sup>163</sup> H.B. 1280 required the CWCB to obtain confirmation from the Division Engineer that a proposed lease or loan of water for ISFs would be “administrable and capable of meeting all applicable statutory requirements.”<sup>164</sup> H.B. 1280 also included measurement and recording requirements for leases and loans of water for ISFs to document: (1) how much leased water the CWCB uses each year the lease is in effect; and (2) how much water flows out of the reach after use by the CWCB.<sup>165</sup> H.B. 1280 required all contracts or agreements for acquisitions of water for ISFs, and water court decrees implementing such agreements, to provide that “the board, lessor, lender, or donor of the water may bring about beneficial use of the historical consumptive use of the . . . water downstream of the instream flow reach as fully consumable reusable water.”<sup>166</sup>

To achieve the desired protection of the historical consumptive use of leased or loaned water, H.B. 1280 required a change of water right or other application to obtain a decreed right to use the water for ISFs, and also required the resulting water court decree to determine a method by which historical consumptive use of the leased water right would be quantified during the term of the lease agreement.<sup>167</sup> Importantly, H.B. 1280 provided that the method must recognize the actual amount of water available under the leased water right and must not result in a reduction of historical consumptive use unless that reduction is based upon the actual amount of water available to the leased water

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160. *Id.*

161. H.B. 08-1280: Protect Leased Instream Flow Water Right, ch.170, §§ 37-92-102(3); 37-92-103(2); 37-92-305(3)(a), Colo. Session Laws 587-590.

162. *Id.* at Section 1.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

right.<sup>168</sup> H.B. 1280 also amended the statutory definition of “abandonment of a water right” to add leases or loans to the CWCB of all or a portion of a water right for ISFs to the list of circumstances for which any period of nonuse of the subject water right would be tolled, and no intent to discontinue permanent use of the water would be found.<sup>169</sup>

G. IN 2008, THE GENERAL ASSEMBLY ENACTED HOUSE BILL 1346 TO PROVIDE FUNDING FOR ACQUISITIONS OF WATER FOR ISF USE

The 2008 CWCB Projects Bill, House Bill 1346 (“H.B. 1346”), established funding for acquisitions of water for ISFs by authorizing an annual appropriation of \$1,000,000 from the CWCB Construction Fund to pay for the lease or purchase of water rights for ISFs, and for costs related to such transactions.<sup>170</sup> H.B. 1346 removed the prohibition added to section 37-92-102(3) in 2008 on using funds from the Construction Fund for ISF acquisitions, and also directed the CWCB to adopt criteria and guidelines regarding its exercise of this new spending authority.<sup>171</sup> In March of 2009, the CWCB adopted Policy 19 (Expenditures of Funds for Water Acquisitions for Instream Flow Use Pursuant to Section 37-60-123.7, C.R.S.). Notably, H.B. 1346 limited expenditures of these funds to acquisitions for ISFs to preserve the natural environment to a reasonable degree and excluded expenditures related to improving the natural environment.<sup>172</sup> In 2013, the General Assembly amended the spending authority established by H.B. 1346 to allow expenditures on acquisitions for ISFs to improve the natural environment to a reasonable degree.<sup>173</sup> The CWCB amended Policy 19 in 2014 to reflect the statutory change.<sup>174</sup> The availability of funding for ISF acquisitions was an important addition to the Instream Flow Program, enabling the CWCB to acquire water for ISFs other than by relying upon donations.

H. IN 2008, THE GENERAL ASSEMBLY ALSO PROVIDED FUNDING FROM THE SPECIES CONSERVATION TRUST FUND FOR ACQUISITIONS OF WATER FOR ISF USE

In 2008, as part of Senate Bill 168 (“S.B. 168”), the General Assembly appropriated \$500,000 from the Species Conservation Trust Fund to pay for acquisitions of water “to 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.”<sup>175</sup>

This authorization requires General Assembly approval of expenditures of

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168. *Id.*

169. *Id.* at Section 2; codified at section 37-92-103(2)(V).

170. H.B. 08-1346: Colorado Water Conservation Board Construction Fund, ch. 338, § 27, § 37-60-123.7, Colo. Session Laws 1564-77.

171. *Id.*

172. *Id.*

173. S.B. 13-181: Colorado Water Conservation Board Construction Projects, ch. 209, § 14, Colo. Session Laws 864-77, § 37-60-123.78).

174. Policy 19 (Expenditures of Funds for Water Acquisitions for Instream Flow Use Pursuant to section 37-60-123.7), dated March 19, 2014.

175. S.B. 08-168: Species Conservation Trust Fund, ch. 339, §§ 3, Colo. Session Laws 1578-82, § 24-33-111 (2)(a)(II).

these funds pursuant to a separate bill.<sup>176</sup> The CWCB has used this funding to pay for a lease from the Ute Water Conservancy District of water stored in Ruedi Reservoir and released for ISFs in the 15-Mile Reach of the Colorado River that provides critical habitat for four endangered fish species. The General Assembly approved this expenditure in 2015, after which the CWCB entered into a renewable short-term lease with the Ute Water Conservancy District.<sup>177</sup> Implementation of that lease has provided 33,000 acre-feet of water to the 15-Mile Reach over the last four years.

### I. 2009 ISF RULEMAKING

In 2009, the CWCB amended the ISF Rules to incorporate the provisions of H.B. 1280 into ISF Rule 6.00, and to revise ISF Rules 8e. (De Minimis Rule) and 8i.(3) (Injury Accepted with Mitigation).<sup>178</sup> The CWCB amended Rule 6.00 to adopt criteria for evaluating proposed leases or loans of water, and to incorporate H.B. 1280's requirements for: (1) specific conditions that must be met as part of the CWCB's approval of a proposed loan or lease of water; (2) provisions that must be included in all agreements for loans or leases of water under section 37-92-102(3); and (3) actions that the CWCB must take in connection with loans or leases of water.<sup>179</sup> The amended ISF Rule 6.00 also clarified the CWCB's water acquisition evaluation process, CWCB funding for water leases and purchases, and public input for proposed acquisitions of water, water rights, or interests in water for ISFs. Amended ISF Rule 6f. established additional factors the CWCB considers for loans and leases of water, and ISF Rules 6g. and 6h. described recording requirements and water reuse provisions to be included in contracts or agreements for water acquisitions.<sup>180</sup> The amendments to ISF Rules 8e. and 8i.(3) generated significant discussion, and are set forth in more detail below.

#### 1. The De Minimis Rule, ISF Rule 8e

In response to both the *Aspen Wilderness* case and S.B. 64, the CWCB enacted ISF Rule 9.00, Modification of ISF Rights, in 1999 to provide a process to allow a decrease in the flow rate; for 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 for subtracting water from an ISF right during any particular time period or season.<sup>181</sup> The *Aspen Wilderness* decision prevented the CWCB from unilaterally decreasing an ISF water right and imposed a fiduciary duty to protect the ISFs appropriated on behalf of the people of Colorado. However, in violation of those basic precepts, the CWCB's de minimis rule,

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176. *Id.*

177. H.B. 15-1277: Species Conservation Trust Fund Projects, ch. 221, § 2, Colo. Session Laws 811-12.

178. *See* "Notice of Public Rulemaking Hearing Before the Colorado Water Conservation Board," dated November 24, 2008.

179. Rules Concerning the Colorado Instream Flow and Natural Lake Level Program 2 CCR 408-2 (2009)

180. *Id.*

181. Statement of Basis and Purpose, Amendments to the Rules Concerning the Colorado Instream Flow and Natural Lake Level Program, 2 CCR 408-2 (1999).

ISF Rule 8.00, had been interpreted by many water users to allow the ISFs to be injured as long as it was not in excess of 1% of the decreed ISF rate. The Rule had stated that “[i]n the event that Staff determines a water court application would result in a 1% depletive effect or less on the stream reach or lake subject of the ISF right,” then “no Statement of Opposition shall be filed.”<sup>182</sup> In Colorado, not filing statements of opposition does not mean that a junior water right can cause injury to a senior water right. The CWCB has limited resources and simply cannot litigate every case that might affect ISFs. To rectify this problematic misperception, the CWCB rewrote the rule in 2009 to clarify that “staff’s decision not to file a Statement of Opposition [in de minimis cases] 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 right.”<sup>183</sup> ISF Rule 8e. further requires staff to “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).”<sup>184</sup>

Thus, the CWCB continues not to not file statements of opposition in every case where an ISF could be injured and instead relies upon the prior appropriation system and the DWR to administer all water rights in priority, and the CWCB notifies applicants of such reliance.

The CWCB revised the Injury with Mitigation Rule, ISF Rule 8i.(3) to allow injury to ISFs in limited circumstances and as long as there is environmental mitigation provided to balance the injury that the Aspen Wilderness case prohibited.

The January 2009 Rules also addressed and clarified the Injury with Mitigation (“IWM Rule”) Rule 8i.(3). In 1994, the CWCB first promulgated the IWM Rule, and in 2009, amended the IWM Rule. Pursuant to the IWM rule, the CWCB agreed, in limited cases, not to call its ISF water right against a junior water right holder when that holder has agreed to a stipulation with the CWCB providing mitigation of the impact in the form of a permanent benefit to the CWCB ISFs or to the natural environment. For example, in the event that there are no available augmentation sources on a river, the CWCB might accept injury to an upper reach, so long as additional water beyond the injury amount has been provided to a lower reach, or where extensive habitat has been restored.

The 1994 and 2005<sup>185</sup> IWM Rule stated:

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182. *Id.*

183. Rules Concerning the Colorado Instream Flow and Natural Lake Level Program 2 CCR 408-2 (2009).

184. Rules Concerning the Colorado Instream Flow and Natural Lake Level Program, 2 CCR 408-2 (2018).

185. The 2005 IWM Rule 8i.(3) changes are indicated by brackets “[ ]”. Rules and Regulations Concerning the Colorado Instream Flow and Natural Lake Level Program, 2 CCR 408-2 (Pp. 1-14 adopted 11/10/93, effective 12/30/93, 16 CR 12. Pp. 4-6 adopted 9/13/94, effective 10/30/94, 17 CR 10). Rules Concerning the Colorado Instream Flow and Natural Lake Level Program, 2 CCR 408-2 (2005).



In the event the pretrial resolution will allow injury or interference to an ISF right, but mitigation offered by the applicant would 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 pre-trial resolution does not include a modification, the board shall: (a) conduct a preliminary review of the proposed pretrial resolution during any regularly scheduled 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 regularly scheduled meeting take final action to ratify, refuse to ratify, or ratify with additional conditions. (c) No pre-trial resolution could be considered pursuant to [this rule] may receive preliminary review and final ratification in the same meeting.<sup>186</sup>

In January of 2009, in anticipation of a negative ruling on the legality of the IWM Rule by the Division 5 water court referee, the CWCB underwent extensive and lengthy revisions to the Rule to provide the public with assurance that it would be applied sparingly and after consideration of many additional factors and much more information.<sup>187</sup> The IWM proposal now requires, *inter alia*, that an IWM proposal must be administrable by the Division of Water Resources, with additional consultation with the Division of Wildlife, which will consider whether the proposed mitigation will enable the Board to continue to preserve or improve the natural environment, considering the reasonableness of alternatives.

Under the 2009 IWM Rule, applicants must provide adequate supporting documentation, including: the location and effect of injury to streams or lakes; a quantification of the amount, timing and frequency of injury; the type of water use that would cause the injury; an analysis showing why protection is not possible; and a detailed description of the proposed mitigation and measures to reduce or minimize the injury and how they will enable the Board to continue to preserve or improve the natural environment of the affected stream or lake despite the injury. Prior to injuring an ISF, the applicant must also provide a feasibility analysis of all water supply alternatives, including those rejected, and address the environmental, economic benefits, reasonableness, and consequences of each alternative.

Under the revised IWM Rule, the CWCB must now consider all of the information provided by applicants, including: the nature and extent of the benefits the mitigation will provide to the existing natural environment of the affected stream or lake and whether it will enable the Board to continue to preserve or improve the natural environment; the scientific justification for accepting the mitigation; and all water supply alternatives.<sup>188</sup> The CWCB must also consider the availability of on-site mitigation alternatives; technical feasibility and reasonableness of each alternative; environmental and economic benefits and consequences of each alternative; and whether the mitigation will satisfy a need unrelated to the IWM proposal.<sup>189</sup> The CWCB can consider mitigation on a different reach of stream or another stream entirely only if no reasonable

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186. *Id.*

187. ISF Rule 8i.(3). Rules Concerning the Colorado Instream Flow and Natural Lake Level Program, 2 CCR 408-2 (2009) (Rule replaced in its entirety, adopted 1/27/09, effective 3/02/09).

188. ISF Rule 8i.(3).

189. *Id.*

alternative exists for mitigation on the affected stream reach.<sup>190</sup> Finally, the IWM Rule requires protective language in a decree to prevent injury to the ISF until the mitigation measures are in place and fully operational and requires that the structural components of the mitigation be maintained permanently and that the CWCB and CPW staff have access thereto.<sup>191</sup> Additionally, the proponent must install and pay operation and maintenance costs of necessary measuring devices and the water court will retain jurisdiction to enforce the necessary terms and conditions as a water matter.<sup>192</sup>

In July of 2009, after promulgation of the IWM Rule, the Division 5 water court referee ruled that the IWM Rule 8i.(3) was unlawful because CWCB did not have the authority to promulgate the IWM Rule based upon the holding of Aspen Wilderness. The referee stated that it would be “an absurd result” to allow the CWCB “to enter into an enforcement agreement contracting for injury by taking less water than is decreed to the ISF pursuant to the IWM Rule instead of following the express procedures that limits (sic) CWCB’s conduct with regard to decreasing ISF appropriation decrees.”<sup>193</sup> “Aspen Wilderness is still good law” and “sets forth detailed procedures the CWCB is to follow when considering decreases to its ISF appropriation decrees and that the IWM Rule impermissibly conflicts with the court’s opinion and section” 37-92-102(4).<sup>194</sup>

Meanwhile, in December of 2009, the Division 4 water court held that the CWCB has the discretion to apply ISF Rule 8i(3) (the IWM Rule) “when no other reasonable water supply alternatives can be implemented and only when the CWCB determines that the mitigation offsetting such injury enables the CWCB to continue to preserve the natural environment to a reasonable degree with the affected ISF water right,” and that the IWM Rule was an appropriate use of the CWCB’s statutory authority.<sup>195</sup>

The CWCB appealed the referee’s decision, and in November of 2010, the Division 5 water court judge reversed the referee’s decision, and held that:

Based upon the legislative history and Colorado law, the Water Court finds that the CWCB has the authority and discretion to apply the IWM Rule pursuant to its statutory authority to “enter into stipulations for decrees or other forms of contractual agreements, including enforcement agreements, that it determines will preserve the natural environment to a reasonable degree” under section 37-92-102(4)(a), as long as no other water user is injured by the IWM case resolution.<sup>196</sup>

Thus, the CWCB, aware of its fiduciary duty to the people of the state of Colorado to protect its ISF water rights, but attentive to the needs of mankind, was able to revise its IWM Rule to achieve an appropriate balance between

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190. *Id.*

191. *Id.*

192. *Id.*

193. Order on Motion for Determination of Question of Law, Case 07CW210, dated July 13, 2009, pp. 7-8.

194. Order on Motion for Determination of Question of Law, Case 07CW210, p. 14.

195. *Concerning the Application for Water Rights of Ranch Properties, LLC, in Ohio Creek*, Case No. 05CW264, Decree, p. 11, dated December 10, 2009.

196. Order, Case 07CW210, p. 2.

protection of its ISF water rights and the consumptive use of water under limited circumstances. The IWM Rule provides an extensive public review and comment procedure and enables certain water rights applications to injure an existing ISF water right after a detailed analysis of the proposed benefits to the environment from the mitigation that offsets the injury in limited circumstances.<sup>197</sup>

## VII. 2010'S DUE PROCESS AND EXCLUSIVE AUTHORITY CHALLENGES (AGAIN)

Over the 2010 decade, two Colorado Supreme Court opinions, one new statute, and one new implementation of an older statute have helped to further define and advance the ISF Program.

### A. 2011 *FARMERS V. CWCB*: THE CWCB'S DETERMINATIONS AND HEARINGS ON WHETHER TO APPROPRIATE ISFs ARE QUASI-LEGISLATIVE DECISIONS SUBJECT TO DEFERENCE FROM THE WATER COURT

In 2011, the CWCB held a hearing on its proposed appropriation for ISF water rights on the San Miguel River in Water Division 4. At the hearing, the CWCB found the ISF appropriation satisfied the requirements of its three determinations under section 37-92-102 (the natural environment will be preserved to a reasonable degree by the water available; there is a natural environment that can be preserved with the water right; and no material injury to other water rights). Farmers Water Development Company ("Farmers") opposed the application in water court, but did not appear at the hearing before the CWCB. The CWCB filed a C.R.C.P. 56(h) Motion for Determination of a Question of Law on whether the Board's decision to make an ISF appropriation is quasi-legislative in nature. Farmers filed a response and its own C.R.C.P. 56(h) motion, summary judgment motions and counterclaims, arguing that the CWCB's ISF determination is quasi-judicial in nature and its procedures were deficient under due process standards. The water court found in the CWCB's favor, concluding that "the relevant factors weigh in favor of categorizing an ISF appropriation as a quasi-legislative proceeding" because it is "not designed to determine the rights and duties of specific individuals, but [is] designed to enact a legislative policy of preserving instream flows in order to protect the environment."<sup>198</sup>

The Colorado Supreme Court upheld the water court's decision that the CWCB's determinations under section 37-92-102 are quasi-legislative. The court held that the CWCB's decision whether an ISF appropriation would preserve the natural environment to a reasonable degree without injury to existing water rights is a policy determination within the discretion of the CWCB. The CWCB's ISF proceedings to establish whether an ISF appropriation by the CWCB would preserve to a reasonable degree the existing natural environment

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197. ISF Rule 8i.(3), Rules Concerning the Colorado Instream Flow and Natural Lake Level Program, 2 CCR 408-2 (2018).

198. *Farmers Water Development Company v. Colorado Water Conservation Board*, 346 P.3d 52 (Colo. 2015)

without injury to existing water rights “is a policy determination within the discretion of the CWCB.”<sup>199</sup> “[I]n rejecting a challenge to the constitutionality of the legislative delegation of power to the CWCB. . . we stated that ‘[t]he legislative objective is to preserve reasonable portions of the natural environment in Colorado,’ and that the legislature empowered the CWCB, an agency ‘having specific expertise regarding the preservation of flora, fauna and other aspects of the natural environment,’ to pursue that policy objective through appropriation of instream flows.”<sup>200</sup> The court noted that because the CWCB is “a unique entity charged with preserving the natural environment to a reasonable degree for the people of the State of Colorado,” the “appropriation of instream flows in order to protect the natural environment is a policy determination delegated to the CWCB, and the “purpose of the CWCB’s notice, comment, and hearing process is to gather input from the public regarding this policy determination.”<sup>201</sup> Finally, the court held that the CWCB’s determination that a particular ISF will preserve the environment to a reasonable degree is a prospective policy determination.

Thus, the court reinforced the quasi-legislative authority the CWCB has to make the ISF determinations. The court also reaffirmed that under section 37-92-102(4)(c), those determinations are reviewed under section 24-4-106(7), C.R.S. (2018) and shall be affirmed by the agency action unless: (a)arbitrary or capricious; (b)a denial of statutory right; or (c)an abuse or clearly unwarranted exercise of discretion, based upon findings of fact that are clearly erroneous on the whole record, unsupported by substantial evidence.<sup>202</sup>

## B. COLORADO WATER TRUST AND THE 2012 “REQUEST FOR WATER”

The Colorado Water Trust (“CWT”) is a private, nonprofit organization dedicated to protecting and restoring streamflows in Colorado. The CWT is an important partner to the ISF Program, especially in the ISF acquisition program. One example of this valuable partnership began in 2012, when the CWT played a major role in jumpstarting the implementation of section 37-83-105(2), originally passed in 2003 and amended in 2005 and 2007. That statute allows water users to use an administrative approval process by the DWR, much like a Substitute Water Supply Plan approval process, to temporarily lease or loan water to the CWCB for ISFs to preserve the natural environment to a reasonable degree on decreed ISF reaches. As Colorado was heading into a particularly dry year in 2012, the CWT approached the CWCB with a proposed process to implement temporary loans and leases. In late April 2012, with snowpack at 31% of average, the CWT announced the “Request for Water” pilot program to invite market-based, voluntary leases and loans to help ensure that water would continue to flow in Colorado’s rivers and streams. This was a limited pilot program to address both the drought impacts to streams and the financial needs of Colorado’s water users for the summer and fall of 2012. CWT sought direct flow or storage water rights for short-term leases into the ISF Program to help protect streams and aquatic habitat. The program was a success and was

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199. *Farmers*, 346 P.3d at 56.

200. *Id.*, at 59; *citing* Colo. River Water Conservation Dist., 594 P.2d at 576-77.

201. *Farmers*, 346 P.3d at 59.

202. *Farmers*, 346 P.3d at 58, fn. 3.

lauded by the public and in the press. The CWT has continued the Request for Water program every year since the first 2012 pilot program announcement. In January 2019, at the CWCB's annual ISF workshop at Colorado Water Congress, the CWT and CWCB staff gave a joint presentation on Request for Water to increase outreach on and awareness of the process. The CWT continues to work toward streamlining the process and increasing outreach to water users who may wish to participate in the program.<sup>203</sup>

C. 2015 *ST. JUDE'S* AND 2017 HB 1190: THERE ARE STRICT  
REQUIREMENTS TO APPROPRIATE WATER FOR RECREATIONAL AND  
PISCATORIAL USES

In *St. Jude's Co. v. Roaring Fork Club, L.L.C.*, 351 P.3d 442 (2015), the Colorado Supreme Court held that a diversion of water from a stream for private instream flows or recreational uses is not a beneficial use. The court reversed the water court's approval of a 21 cfs water right diverted to a ditch from the stream to private property for aesthetic, recreational and piscatorial uses without impoundment. After briefing and hearing oral arguments, the court requested additional briefing from the CWCB and the Department of Natural Resources, among others. The Department of Natural Resources briefed the court, arguing that allowing private individuals to appropriate direct flow water from the stream for aesthetic, recreational and piscatorial uses erodes the purpose of the ISF Program. The DNR described how both ISFs and recreational in-channel diversions ("RICDs") are subject to strict standards for appropriation while the applicant's claim in the case was not based on objective standards, but rather based solely on subjectivity.<sup>204</sup>

The court held that the contemplated uses were not "beneficial uses" under the '69 Act's requirements that "reasonableness, efficiency, and avoidance of waste reflects the long-accepted understanding that in order to be beneficial a use must have objective limits, beyond which it becomes unreasonable, inappropriate, inefficient, or wasteful."<sup>205</sup> "This characteristic is typified in the classic beneficial use of irrigation, in which a given irrigation project necessarily implies a duty of water—a total volume of water reasonably needed for a given use, beyond which that use is no longer beneficial."<sup>206</sup> "This requirement, embodied in the 1969 Act's use of the term 'beneficial,' is integral to the very concept of beneficial use, for without it the requirement of reasonableness, efficiency, and non-wastefulness can have no meaning." The court concluded that "[t]he flow of water necessary to efficiently produce beauty, excitement, or fun cannot even conceptually be quantified," and thus there is no way to properly limit such use.<sup>207</sup>

The court held that, unlike ISFs or RICDs that are highly regulated, the

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203. See [coloradowatertrust.org/request-for-water](http://coloradowatertrust.org/request-for-water).

204. *Amicus Curiae* Brief of the Colorado Department of Natural Resources in support of the Colorado Water Conservation Board, *St. Jude's*, 351 P.3d 442 (2015) (No. 2013SA132).

205. *St. Jude's*, 351 P.3d at 450.

206. *St. Jude's*, 351 P.3d at 450-51.

207. *St. Jude's*, 351 P.3d at 451.

subjectivity of the uses claimed “would substantially undermine the intent evident in the legislature’s instream flow and RICD provisions.”<sup>208</sup> “The General Assembly has taken great care to limit recreational and environmental uses of water in-channel, largely to deal with the potential dangers and excesses inherent in capturing the flow of the stream.”<sup>209</sup> “[U]sing a diversion to effectively change the path of a natural stream or a significant portion of it” to recreate a natural stream on private property “is tantamount to a ‘forbidden riparian right.’”<sup>210</sup> “It is for the General Assembly to approve such.” The court also held that the applicant sought “to accomplish by virtue of diversion what the legislature has expressly prohibited instream: By using a diversion to effectively change the path of a natural stream or a significant portion of it, the Club seeks approval for re-creating a natural stream on its private property and adjudicating the rights to enjoy the flows therein.”<sup>211</sup>

Finally, the court held that:

The Club’s proposed “uses” of the water in question, as expressed in its application, cannot be beneficial within the meaning of the Act because the only purpose they are offered to serve is the subjective enjoyment of the Club’s private guests. The flow of water necessary to efficiently produce beauty, excitement, or fun cannot even conceptually be quantified, and therefore where these kinds of subjective experiences are recognized by the legislature to be valuable, it has specifically provided for their public enjoyment, scientific administration, and careful measurement. See, e.g., § 37-92-102 (restricting appropriation of instream flows and in-channel diversions to particular purposes and amounts as determined by a state agency bound by fiduciary duty, and with public participation). Without describing a purpose for the accomplishment of which a measurable amount of water, however approximate, must be used, the Club, by definition, fails to articulate an intent to put the specific amount of water it claims to a beneficial use.<sup>212</sup>

Accordingly, the court held the Club’s applications for “aesthetic, recreation, and piscatorial” uses did not fit under any of the Act’s specifically authorized uses because the Club was not impounding any water, only the CWCB can appropriate instream flows, and the Act reserved recreational in-channel diversion for governmental entities.

In 2017, the General Assembly passed House Bill 1190, which amended section 37-92-305 to provide that the decision in the *St. Jude’s Co.* case does not apply to previously decreed absolute and conditional water rights or claims pending as of July 15, 2015. However changes of those “grandfathered” water rights are restricted to changes in point of diversion only and cannot be changed to effectuate other adaptations.<sup>213</sup> The interpretation of section 37-92-103(4) in *St. Jude’s Co.* applies only to direct-flow appropriations, without storage, filed

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208. *St. Jude’s*, 351 P.3d at 451.

209. *Id.*, at 451.

210. *Id.*

211. *Id.*

212. *Id.*

213. H.B. 17-1190: Limited Applicability of *St. Jude’s Co.* Water Case, ch. 266, §§ 37-92-305(20), Colo. Session Laws 1435-7.

after July 15, 2015, for water diverted from a surface stream or tributary groundwater by a private entity for private aesthetic, recreational, and piscatorial purposes.

**D. IN 2018, THE GENERAL ASSEMBLY ENACTED SENATE BILL 170 TO ALLOW THE CWCB TO PROTECT MITIGATION RELEASES IN A STREAM AS AN ISF USE**

Senate Bill 170 (“S.B. 170”)<sup>214</sup>, provides that a water rights owner may work with CWCB to protect “Mitigation Releases” from diversion through a “qualifying stream reach” from a reservoir for ISFs, under certain restrictions. The Northern Colorado Water Conservancy District (“Northern”) proposed S.B. 170, in part, so that Northern would have a legal tool to provide and protect mitigation releases for its planned Glade Reservoir in the Cache la Poudre basin. The mitigation supply is required pursuant to Northern’s approved mitigation and enhancement plan entitled Northern Integrated Supply Project (“NISP”) Fish and Wildlife Mitigation and Enhancement Plan (“FWMEP”).<sup>215</sup> Under S.B. 170, the project proponent, as an owner of a water storage right to be stored in new reservoir capacity, may contract with CWCB to “reasonably avoid, minimize, or mitigate impacts of the new reservoir capacity on fish and wildlife resources within an identified stream reach” to enable the owner to comply with a “fish and wildlife mitigation plan approved under section 37-60-122.2.”<sup>216</sup> After two years of stakeholder meetings and one failed attempt to pass such legislation in 2017, the General Assembly passed S.B. 170 in 2018. Subsequently, CWCB staff and Northern staff brought a proposal to protect mitigation releases from the future Glade Reservoir to the CWCB Board for approval of a water delivery agreement in a regular two-board meeting process. The Board approved the agreement and authorized its staff to file a water court application. Subsequently, Northern and CWCB, as co-applicants, filed the required water court application to obtain a decreed right for protection of the mitigation releases.<sup>217</sup> With twelve opposing parties, the case is currently pending before the water court referee in Water Division 1.

**VIII. CONCLUSION & LOOKING FORWARD TO 2020’S**

Instream flow water rights can play an important role in the implementation of Colorado’s Water Plan<sup>218</sup> and local basin implementation plans, contributing

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214. Colo. Rev. Stat. § 37-92-102(8).

215. Fish and Wildlife Mitigation and Enhancement Plan, October 10, 2017. Prepared for The Colorado Parks and Wildlife Commission. Applicant is Northern Water acting by the through Northern Integrated Supply Project Water Activity Enterprise Northern Colorado Water Conservancy District. The Full Mitigation plan can be found at: [www.northernwater.org/docs/NISP/MapsDocuments/2017FWMEPFinal.pdf](http://www.northernwater.org/docs/NISP/MapsDocuments/2017FWMEPFinal.pdf)

216. S.B. 18-170: Reservoir Releases for Fish and Wildlife Mitigation, ch. 125, § 37-92-102(8), Colo. Session Laws 835-43.

217. See Case No. 18CW3216, Water Division 1.

218. Colorado’s Water Plan, Collaborating on Colorado’s Water Future, <https://www.colorado.gov/pacific/cowaterplan/plan>

to Colorado's water value of "a strong environment that includes healthy watersheds, rivers and streams, and wildlife."<sup>219</sup> New ISF appropriations are important to secure flow rates in the minimum amount necessary in streams where water is available to preserve the natural environment to a reasonable degree. The ISF acquisition program is important to provide more senior water rights, or releases of stored water rights, to streams to help preserve and improve the natural environment. The CWCB hopes to work more closely with all facets of the water community to protect Colorado's streams and rivers while meeting agricultural, municipal, industrial, and other water needs.

In 2018, Senate Bill 170 was taken to the General Assembly by other entities seeking flexibility in the ISF acquisition program. The need to protect reservoir releases to satisfy state and federal environmental mitigation goals remains a tricky issue in Colorado water rights. CWCB, working through its ISF Program, has been an important partner in protecting mitigation releases and bypassed water since the Program's inception. S.B. 170 was an important new step to address some of the state's mitigation goals.

A raised awareness of the needs for and benefits of ISFs and other non-consumptive uses has resulted in part from the comprehensive, stakeholder-driven process to develop Colorado's Water Plan. As more entities desire and request stream flow in their neighborhood, they are reaching out to the CWCB and its ISF program to help. Some of the larger entities hold water rights that may be made available and would like to see those rights used, at times, to help bring stream flow up to a reasonable rate to preserve or improve the natural stream environment. It remains to be seen whether implementation of existing law will be sufficient to meet these needs. As with Senate Bill 170, water users have come forward and will continue to come forward to their legislators to request laws for clarification, and in some cases a broadening of the CWCB's authority. Such laws will enable the CWCB to continue to collaborate with water rights owners on acquisitions and instream flow use of water, water rights, and interests in water under certain conditions, while paying specific attention to preventing injury to other water users.

The ISF Program is widely accepted and trusted by many water users, however there are some who do not see the need for environmental flows protection. Consequently, while the ISF Program receives strong support, legal and political challenges continue to arise. Nonetheless, the CWCB will continue to work to ensure the success of the ISF Program by defending against such challenges. CWCB will also continue to reach out to communicate and coordinate with other water users to reach mutual understanding of each other's missions and goals. The CWCB's ISF program has a bright future as a dedicated staff and balanced Board of directors continue to focus on new ISF appropriations, new ISF acquisitions, and protecting the ISF water rights it holds in trust on behalf of the people of the state of Colorado. CWCB staff guided by its Board will also continue to work together with other interests toward creative projects that can integrate multiple uses and benefits for present and future generations.

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219. See Colorado's Water Plan, p. 1-6.