



## Guideline 2021-1

### PROCEDURE FOR THE STATE ENGINEER TO CONFIRM THE EXTENT OF CLAIMED UNADJUDICATED USES OR EXCHANGES OF WATER BEING MADE ON THE DATE OF APPROPRIATION OF AN INSTREAM FLOW WATER RIGHT

#### Objective

Describe the process for a water user to request that the State Engineer confirm the extent of claimed unadjudicated uses or exchanges being made on the date of appropriation of an instream flow water right consistent with section 37-92-502(2)(c), C.R.S.

#### Relevant Statutes

The following statutes are relevant to this guideline:

Section 37-92-102(3)(b), C.R.S. Basic tenets of Colorado water law

Any such [instream flow] appropriation shall be subject to the present uses or exchanges of water being made by other water users pursuant to appropriation or practices in existence on the date of such appropriation, whether or not previously confirmed by court order or decree.

Section 37-92-502(2)(c), C.R.S. Orders as to waste, diversions, distribution of water

Upon a claim made to the State Engineer for administration pursuant to section 37-92-102(3)(b), the State Engineer shall confirm the extent of the claimed unadjudicated use or exchange of water being made pursuant to appropriation or practices in existence on the date of appropriation of an instream flow water right. The State Engineer's confirmation is reviewable by the water court on a de novo basis. Nothing in this subsection (2)(c) requires or prohibits a water user from seeking water court confirmation or adjudication of the preexisting uses or exchanges.

#### Procedure

This procedure provides for situations where beneficial uses or exchanges of water were in



existence on the date of the appropriation of an instream flow water right (“present uses”).<sup>1</sup> Water users may request that the State Engineer<sup>2</sup> confirm the extent of claimed present uses to allow that practice to continue without being curtailed when the Colorado Water Conservation Board (CWCB) requests that the water commissioner place a call to fulfill an instream flow water right. Water users may submit a request to the State Engineer at any time but are encouraged to request confirmation of present uses prior to any request for a call to allow time to review the claim. To request confirmation from the State Engineer, a water user shall:

1. Submit to the State Engineer<sup>3</sup> an affidavit from a person with personal knowledge of the present uses, including:
  - a. the water division where the present uses occur and the name of the related instream flow,
  - b. the type of present uses,
  - c. the rate diverted to accomplish such use without waste. For water that was stored, the volume stored,
  - d. the point of diversion and place where water was used,
  - e. the approximate date of first use or exchange and a list of the years water was diverted,
  - f. how the present uses were legal under Colorado’s priority system. For instance, a diversion was during free river, when all beneficial uses on the stream were fulfilled, pursuant to a futile call determination, or pursuant to a written administrative approval,
  - g. the typical season of use (beginning and ending month and day of month). If the season of use or amount of use varies under certain conditions, how and why that variation occurs, and
  - h. attachments to the affidavit, which may include:
    - i. relevant evidence showing that the use was in existence at the time of the instream flow appropriation. Such evidence may include aerial or other photographs, letters from knowledgeable parties, business records (such as livestock counts), government records, personal or DWR records of water use, or other information
    - ii. any other information supporting the claim.
2. The State Engineer will forward the request to CWCB staff requesting they provide any

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<sup>1</sup> For simplicity, the procedure refers to the term present uses, which includes exchanges that were administratively approved prior to an instream flow appropriation.

<sup>2</sup> The State Engineer may delegate this task to the Division Engineer or other staff of the Division of Water Resources (“DWR”).

<sup>3</sup> Submit an email with the affidavit as an attachment to [DWRPermitsOnline@state.co.us](mailto:DWRPermitsOnline@state.co.us) with a subject line of, “102(3)(b) request to confirm pre-existing use in Water Division X”, where X is the DWR water division in which the use or exchange occurs.

- comments within 35 days.
3. The State Engineer will notify the water user within 35 days of the request if there is not enough information to confirm the request or if the request is contrary to other information available to the State Engineer.
  4. Upon the CWCB's response or the expiration of 35 days, the State Engineer will evaluate all information available related to the request.
  5. The State Engineer's decision on the extent of present uses and the rationale for that decision will be documented in a letter to the water user and the CWCB. The letter will also describe the instream flow(s) associated with the confirmation.
  6. The State Engineer will add the appropriate documentation to DWR's database and imaged documents to allow for proper administration consistent with section 37-92-102(3)(b), C.R.S.

**Approval**

This guideline may only be modified or revoked in writing by the State Engineer.

Approved this 15th day of September, 2021.



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State Engineer/Director