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WRITTEN INSTRUCTION 2015-02

Instruction Concerning the Administration of Diversions of Water during Free River

Pursuant to section 37-92-501(1), C.R.S., the State Engineer hereby issues this Written Instruction concerning the administration of diversions of water during free river. The State Engineer and Division Engineers shall allow diversions of water during free river, subject to the explanation below.

1.0 INTRODUCTION

The State Engineer may issue written instructions and orders to the Division Engineers regarding the administration of water rights. The State Engineer may also promulgate rules to establish administration practices, but such rules are not required for administration.

This Written Instruction directs the Division Engineers concerning the administration of water rights in order to ensure consistent and equitable administration that is also consistent with Colorado water law and applicable court decrees.

2.0 PURPOSE

This Written Instruction shall direct the Division Engineers in administering diversions during free river.

3.0 AUTHORITY

This Written Instruction is issued pursuant to section 37-92-501, C.R.S. This Written Instruction ensures that water users in Colorado may divert waters of the state to beneficial use while ensuring that such practices are consistent with the law and occur without causing injury to vested water rights.

4.0 PROCEDURES

According to the Colorado Supreme Court in [*Empire Lodge Homeowners' Ass'n v. Moyer, 39 P.3d 1139 \(Colo.2001\)*](#), “free river” conditions occur when there is sufficient natural supply to satisfy all water uses, whether decreed or undecreed, and State Engineer administration is unnecessary for the protection of decreed water rights.” In the same ruling, the court alludes to “free river” conditions when the river is free from calls due to ample supply.” For the purposes of this

Written Instruction, the above-cited language of the Supreme Court will be used to describe free river conditions or “Free River.”

The objective of this Written Instruction is to provide the Division Engineers guidance regarding the requirements of water users that divert water during Free River and the accounting and administration, if applicable, associated with the diversion. The Written Instruction addresses the requirements for both direct flow diversions and diversions into storage during Free River while also addressing the requirements for a water user that has or does not have existing water rights.

1. Free River conditions exist for a reach of a river when “there is sufficient natural supply to satisfy all water uses, whether decreed or undecreed, and State Engineer administration is unnecessary for the protection of decreed water rights.” In all cases where a water user is diverting water as allowed during Free River, the water user has the responsibility to cease diverting immediately when Free River no longer exists.
2. The Division Engineers shall allow water to be diverted during Free River without a decreed water right as long as the water user diverting the water has confirmed with the Division of Water Resources that Free River conditions exist and the water is placed to a beneficial use. After the water user has confirmed that Free River exists, unless any of the following conditions require it, the Division Engineers shall require no notice to divert water during Free River.
3. The Division Engineers shall allow a water user with a decreed water right to divert during Free River with the following limitations:
 - a. If the diversion is for uses decreed for the water right, whether for direct-flow or storage purposes, the amount of the diversion will be credited to any volumetric limits for that decreed water right and must take place consistent with the terms and conditions of that water right. This requirement ensures that the diversion during Free River does not alter the historical exercise of the water right, potentially resulting in injury. Further, this requirement ensures that any provisions associated with the decreed diversion that protect other water users are retained. Should direct flow diversions during Free River reach any volumetric limitations imposed by the water court for a time period, subsequent diversions during Free River during that time period need not comply with the provisions that may have been decreed for the diverting structure.
 - b. If the diversion is for uses not decreed by the water right and the diversion is for direct flow uses, the diversion need not comply with terms and conditions of the decreed water right.
 - c. If the diversion is for uses not decreed by the water right and the diversion is for storage, the diversion need not comply with terms and conditions of the decreed water right. Because Free River diversions to storage could cause injury by extending the period the reservoir may divert to a different time of year, accounting must show that the decreed water rights for the water user have been filled in an amount equal to the amount diverted during Free River (“paper filled”), in order of seniors first. Specifically, diversions into

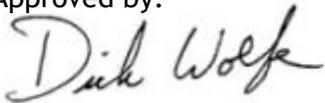
reservoirs with existing water rights during Free River must be made in accordance with accounting¹ approved by the Division Engineers prior to the diversion into storage. See the Division of Water Resources' Reservoir Administration Guidelines on the DWR website.

(http://water.state.co.us/DWRIPub/Documents/Res_Admin_Guidelines_Oct2011.pdf)

Basis for this direction: The water court has determined that a diversion during Free River “creates the potential for water users to “bank” their more senior water rights, including historic consumptive use credits for diversion during times when the junior rights were called out, thereby altering the historic exercise of the senior rights resulting in injury.”² Diversions during Free River for structures with water rights that have volumetric limits, including diversions into reservoirs with existing water rights, have the potential to allow the owner of the water right to divert some or all of the decreed amount of the water right. If the diversion is not applied to the accounting for the water right, the diversion has the potential to extend the priority water right later into the season, impacting the historical exercise to the detriment of other water users. Therefore, the owner of the water right must reconcile the diversion during Free River with the accounting for the decreed water right to ensure the diversion does not cause injury by altering the historical exercise of the water right.

4. If Free River water does not leave the direct control of the user, the Division Engineers shall allow the water to be reused or successively used without notice³. However, for water diverted during Free River and released from the direct control of the water user, the Division Engineers shall allow reuse or successive use of the water only if all of the elements of an independent appropriation have been established and decreed as a separate water right⁴, which requires prior approval from the water court. Therefore, if water diverted during Free River is used once and then released to waters of the State, the Division Engineers shall not allow its reuse or successive use without approval of the water court.

Approved by:



Dick Wolfe, Director/State Engineer

Date: November 4, 2015

¹ Accounts reflect separate and distinguishable ownership, types, uses or “colors” of water in a reservoir. The sum of all accounts equals the amount of water in storage on a daily basis. Refer to the *Reservoir Accounting Guideline, Division One - South Platte River*, dated February 25, 2013 and *General Administration Guidelines for Reservoirs*.

² Case No. 04CW236, Division 5.

³ Accounting may be required on a case by case basis to verify compliance with conditions for decreed rights of the same water user.

⁴ *Santa Fe Trail Ranches Prop. Own. Assoc. v. Hal Simpson*, 99SA91