

COLORADO WATER CONSERVATION BOARD
Department of Natural Resources

John W. Hickenlooper, Governor
Mike King, DNR Executive Director
Jennifer L. Gimbel, CWCB Director



SENATE BILL 13-181, SECTION 15

- Section 15 of Senate Bill 13-181 contains a proposed amendment to section 37- 60-123.7, C.R.S. that would enable the CWCB to use the funds authorized in that section to be used for the costs of water acquisitions that will *improve* the natural environment to a reasonable degree. Currently, the statute limits use of the funds to paying the costs of water acquisitions that will *preserve* the natural environment to a reasonable degree.
- Under this proposal, the sole change to the CWCB’s statutory authority would be to its spending authority governing the funds authorized for the costs of water acquisitions for instream flow use to preserve or improve the natural environment to a reasonable degree.
- The proposal does not change the CWCB’s statutory authority regarding what types of use the CWCB can make of water acquired for instream flow use.
- The CWCB was authorized to use acquired water to improve the natural environment to a reasonable degree in 2002, when the General Assembly passed Senate Bill 02-156, amending section 37-92-102(3):

The board may also acquire, by grant, purchase, donation, bequest, devise, lease, exchange, or other contractual agreement, from or with any person, including any governmental entity, such water, water rights or interests in water in such amount as the board determines is appropriate for stream flows or for natural surface water levels or volumes for natural lakes to preserve or improve the natural environment to a reasonable degree.

- Four years later, in the 2008 CWCB Projects Bill (HB 08-1346), the General Assembly authorized an annual appropriation of \$1,000,000 to the CWCB to pay for the costs of acquiring water, water rights and interests in water for instream flow use. That provision of HB 08-1346 is codified at section 37-60-123.7, C.R.S.
- The bill provided that” the primary priority for expenditures of these funds shall be the costs of water acquisitions for existing or new instream flow water rights to preserve the natural environment to a reasonable degree.”

- That same year, the General Assembly adopted Senate Bill 168, appropriating up to \$500,000 from the Species Conservation Trust Fund (“SCTF”) to the Department of Natural Resources (“DNR”) for water acquisitions 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 are likely to become candidate species.
- Water acquisitions paid for from the SCTF must be approved by the DNR Executive Director and reviewed by the General Assembly.
- ISF Rule 6 governs the process for evaluating and accepting water acquisitions paid for from both sources of funds.
- ISF Rule 6 is both summarized below and attached in its entirety.
 - Before acquiring water for ISF use, the CWCB considers the following factors:
 - Reach of stream where acquired water will be used
 - Location of other water rights on stream reach
 - Potential for material injury to existing decreed water rights
 - Effect of proposed acquisition on
 - Interstate compact issues
 - Maximum utilization of waters of state
 - Whether the water will be available for subsequent use downstream
 - Historical use and return flows
 - Natural environment that may be preserved or improved by the proposed acquisition (based upon a biological analysis conducted by Colorado Parks and Wildlife)
 - Water administration issues, if any
 - Additional factors the CWCB considers for long-term leases:
 - Extent to which the leased water will preserve or improve the natural environment to a reasonable degree -- CWCB must request and review a biological analysis from CPW
 - Diversion records and beneficial use of leased water right
 - Locations of other water users on subject reach of stream
 - Reason(s) the water is available for lease or loan
 - Obtain confirmation from the Division Engineer that the proposed lease or loan is administrable
 - Process
 - CWCB: Two-meeting process; any person may request a full board hearing on a proposed acquisition.
 - Water Court: CWCB must obtain a decreed right to use the acquired water to preserve/improve the natural environment to a reasonable degree. The water court decree will include terms and conditions to prevent injury to other water rights.
- Since 2002, the CWCB has entered into 7 water acquisitions transactions where the acquired water was or will be used to improve the natural environment to a reasonable degree.

- 2004: Carbon Lake Ditch donated for ISF use on Mineral Creek and Big Horn Gulch in Water Division 7 (Case No. 04CW40)
 - No existing ISFs on these streams
 - Decreed for ISF use to preserve and improve the natural environment to a reasonable degree on Mineral Creek (15 cfs 5/15—10/31) and three reaches of Big Horn Gulch (5 cfs 5/15—10/31; 10 cfs 5/15—10/31; and 15 cfs 5/15—10/31). Separate flow rates for preserve and improve not specified in decree.
- 2005: Peabody Ditch and Lund Enlargement donated for ISF use on Boulder Creek and the Blue River in Water Division 5 (Case No. 05CW264)
 - Decreed in 2011 for ISF use to preserve and improve the natural environment on Boulder Creek and three reaches of the Blue River.
 - Decreed rates on Boulder Creek range from 0.04 –3.51 cfs, and will be used (1) to preserve - bring flows up to the previously decreed ISF rate of 6 cfs; and (2) when available, to improve.
 - Decreed rates on Blue River range from 0.02 – 0.45 cfs, and will be used (1) to preserve - bring flows up to the previously decreed ISF rates of 125 and 90 cfs; and (2) when available, to improve.
- 2009: Stapleton Brothers Ditch donated via trust agreement for ISF use on Maroon Creek and the Roaring Fork River in Water Division 5 (Case No. 10CW184 pending)
 - Claimed flow amounts on Maroon Creek range from 0.35 -- 3.83 cfs, and will be used (1) to preserve - bring flows up to the previously decreed ISF rate of 14 cfs; and (2) when available, to improve.
 - Claimed flow rates on Roaring Fork River below historical point of return flows range from 0.05 – 0.89 cfs, and will be used (1) to preserve - bring flows up to the previously decreed ISF rates of 55 and 30 cfs; and (2) when available, to improve.
- 2010: Breem Ditch for ISF use on Washington Gulch in Water Division 4 (Case No. 10CW180 pending)
 - Colorado Water Trust and CWCB shared costs of purchasing permanent conservation use right of the water right
 - CWCB purchased portion of water right that will preserve, and CWT purchased and donated to CWCB portion of water right that will improve the natural environment.
 - Claimed flow amounts on Washington Gulch: 2.5 cfs to preserve and 2.95 cfs to improve the natural environment
- 2010 and 2012: Gabino-Gallegos Ditch (2.5 cfs) and Valdez Ditch (.5 cfs) donated for ISF use on Alamosa River in Water Division 3 to preserve and improve natural environment

- 2,000 AF of storage space donated to CWCB to store the acquired water for release for ISF use
 - No water court application to date because acquiring small increments of water
 - Working with CPW on flow rates
- 2011: Numerous water rights owned by Denver Water and donated for ISF use on the Fraser River and its tributaries, and on the Williams Fork River and its tributaries in Water Division 5 (approximately 100 stream segments)
 - Interest in 1,000 AF of water conveyed to CWCB via an agreement between Grand County, Denver and CWCB as one component of the Colorado River Cooperative Agreement.
 - Water will be used to preserve where CWCB already holds a decreed ISF water right; will be used to improve on streams with no ISF water right, many of which historically have been dried up by water rights diversions.

From Rules Concerning the Colorado Instream Flow and Natural Lake Level Program, 2 CCR 408-2

6. ACQUISITION OF WATER, WATER RIGHTS OR INTERESTS IN WATER FOR INSTREAM FLOW PURPOSES.

The Board may acquire water, water rights, or interests in water for ISF purposes by the following procedures:

6a. Means of Acquisition.

The Board may acquire, by grant, purchase, donation, bequest, devise, lease, exchange, or other contractual agreement, from or with any Person, including any governmental entity, such water, water rights, or interests in water that are not on the Division Engineer's abandonment list in such amounts as the Board determines are appropriate for stream flows or for natural surface water levels or volumes for natural lakes to preserve or improve the natural environment to a reasonable degree.

6b. 120 Day Rule.

At the request of any Person, including any governmental entity, the Board shall determine in a timely manner, not to exceed one hundred twenty days, unless further time is granted by the requesting Person, what terms and conditions the Board will accept in a contract or agreement for the acquisition. The 120-day period begins on the day the Board first considers the proposed contract or agreement at a regularly scheduled or special Board meeting.

6c. Stacking Evaluation.

The Board shall evaluate whether to combine or stack the acquired water right with any other ISF appropriation or acquisition, based upon the extent to which the acquired water will provide flows or lake levels to preserve or improve the natural environment to a reasonable degree.

If the Board elects to combine or stack the acquired water right, the details of how the water rights are to be combined or stacked with other existing ISF appropriations or acquisitions must be set forth in the application for a decree to use the acquired right for instream flow purposes.

6d. Enforcement of Acquisition Agreement.

Pursuant to section 37-92-102(3), C.R.S., any contract or agreement executed between the Board and any Person which provides water, water rights, or interests in water to the Board shall be enforceable by either party thereto as a water matter in the water court having jurisdiction over the water right according to the terms of the contract or agreement.

The Board shall evaluate the appropriateness of any acquisition of water, water rights, or interests in water to preserve or improve the natural environment. Such evaluation shall include, but need not be limited to consideration of the following factors:

- (1) The reach of stream or lake level for which the use of the acquired water is proposed, which may be based upon any one or a combination of the following: the historical location of return flow; the length of the existing instream flow reach, where applicable; whether an existing instream flow water right relies on return flows from the water right proposed for acquisition; the environment to be preserved or improved by the proposed acquisition; or such other factors the Board may identify;
- (2) The natural flow regime;
- (3) Any potential material injury to existing decreed water rights;
- (4) The historical consumptive use and historical return flows of the water right proposed for acquisition that may be available for instream flow use;
- (5) The natural environment that may be preserved or improved by the proposed acquisition, and

whether the natural environment will be preserved or improved to a reasonable degree by the water available from the proposed acquisition;

- (6) The location of other water rights on the subject stream(s);
- (7) The effect of the proposed acquisition on any relevant interstate compact issue, including whether the acquisition would assist in meeting or result in the delivery of more water than required under compact obligations;
- (8) The effect of the proposed acquisition on the maximum utilization of the waters of the state;
- (9) Whether the water acquired will be available for subsequent use or reuse downstream;
- (10) The cost to complete the transaction or any other associated costs; and
- (11) The administrability of the acquired water right when used for instream flow purposes.

The Board shall determine how to best utilize the acquired water, water rights or interest in water to preserve or improve the natural environment.

6f. Factors Related to Loans and Leases.

In addition to considering the factors listed above, for loans and leases of water, water rights and interests in water for ISF purposes under section 37-92-102(3),

- (1) The Board shall consider the extent to which the leased or loaned water will preserve or improve the natural environment to a reasonable degree, including but not limited to:
 - (a) Whether the amount of water available for acquisition is needed to provide flows to meet a decreed ISF amount in below average years; and
 - (b) Whether the amount of water available for acquisition could be used to and would improve the natural environment to a reasonable degree, either alone or in combination with existing decreed ISF water rights.
- (2) In considering the extent to which the leased or loaned water will preserve or improve the natural environment to a reasonable degree, the Board will request and review a biological analysis from the Colorado Division of Wildlife, and will review any other biological or scientific evidence presented to the Board.
- (3) If other sources of water are available for acquisition on the subject stream reach(es) by purchase or donation, the Board shall fully consider each proposed acquisition and give preference first to the donation and then to a reasonable acquisition by purchase.
- (4) The Board shall obtain confirmation from the Division Engineer that the proposed lease or loan is administrable and is capable of meeting all applicable statutory requirements.
- (5) The Board shall determine, through negotiation and discussion with the lessor, the amount of compensation to be paid to the lessor of the water based, in part, upon the anticipated use of the water during and after the term of the lease.
- (6) The Board shall consider evidence of water availability based upon the historical record(s) of diversion, the beneficial use of the subject water right, the location and timing of where return flows have historically returned to the stream, and the reason(s) the water is available for lease or loan.

6g. Recording Requirements.

- (1) All contracts or agreements for leases or loans of water, water rights or interests in water under section 37-92-102(3) shall require the Board to:
 - (a) Maintain records of how much water the Board uses under the contract or agreement each year it is in effect; and
 - (b) Install any measuring device(s) deemed necessary by the Division Engineer (1) to administer the lease or loan of water, (2) to measure and record how much water flows out of the reach after use by the Board under the lease or loan; and (3) to meet any other applicable statutory requirements.

(2) All contracts or agreements for leases or loans of water shall provide for the recording of the actual amount of water legally available and capable of being diverted under the leased or loaned water right during the term of the lease or loan, with such records provided to the Division of Water Resources for review and publication.

6h. Water Reuse.

All contracts or agreements for the acquisition of water, water rights or interests in water under section 37-92-102(3) shall provide that the Board or the seller, lessor, lender or donor of the water may bring about beneficial use of the historical consumptive use of the acquired water right downstream of the ISF reach as fully consumable reusable water, pursuant to the water court decree authorizing the Board to use the acquired water.

(1) The bringing about of beneficial use of the historical consumptive use of the water may be achieved by direct use, sale, lease, loan or other contractual arrangement by the Board or the seller, lessor, lender or donor.

(2) The contract or agreement also shall provide that the Division Engineer must be notified of any agreement for such beneficial use downstream of the ISF reach prior to the use.

(3) Prior to any beneficial use by the Board of the historical consumptive use of the acquired water right downstream of the ISF reach, the Board shall find that such use:

(a) Will be consistent with the Board's statutory authority and with duly adopted Board policies and objectives; and

(b) Will not injure vested water rights or decreed conditional water rights.

6i. Applications for a Decreed Right to Use Water for ISF Purposes.

The Board shall file a change of water right application or other applications as needed or required with the water court to obtain a decreed right to use water for ISF purposes under all contracts or agreements for acquisitions of water, water rights or interests in water under section 37-92-102(3), including leases and loans of water. The Board shall file a joint application with the Person from whom the Board has acquired the water or a Person who has facilitated the acquisition, if requested by such Person. The Water Court shall determine matters that are within the scope of section 37-92-305, C.R.S. In a change of water right proceeding, the Board shall request the Water Court to:

(1) Verify the quantification of the historical consumptive use of the acquired water right;

(2) Verify the identification, quantification and location of return flows to ensure that no injury will result to vested water rights and decreed conditional water rights;

(3) Include terms and conditions providing that:

(a) The Board or the seller, lessor, lender, or donor of the water may bring about the beneficial use of the historical consumptive use of the changed water right downstream of the ISF reach as fully consumable reusable water, subject to such terms and conditions as the water court deems necessary to prevent injury to vested water rights and decreed conditional water rights; and

(b) When the Board has not identified such downstream beneficial use at the time of the change of water right, the Board may amend the subject change decree, if required by the Division Engineer, to add such beneficial use(s) of the historical consumptive use downstream of the ISF reach at the time the Board is able to bring about such use or reuse, without requiring requantification of the original historical consumptive use calculation; and

(4) Decree the method by which the historical consumptive use should be quantified and credited during the term of the agreement for the lease or loan of the water right pursuant to section 37-92-102(3), C.R.S.

6j. Limitation on Acquisitions.

The Board may not accept a donation of water rights that were acquired by condemnation, or that would require the removal of existing infrastructure without approval of the current owner of such infrastructure.

6k. Temporary Loans of Water to the Board.

The Board may accept temporary loans of water for instream flow use for a period not to exceed 120 days in any one year, in accordance with the procedures and subject to the limitations set forth in section 37-83-105, C.R.S.

(1) Within 5 working days after receiving an offer of a temporary loan of water to the Board for temporary instream flow use, the Director will provide a response to the proponent and, unless the proposed loan has no potential value for instream flow use, staff will coordinate with the proponent on preparing and submitting the necessary documentation to the State and Division Engineers required by sections 37-83-105(2)(a)(I) and (2)(b)(I), C.R.S., and providing the public notice required by section 37-83-105(2)(b)(II), C.R.S.

(2) Provided that the State Engineer has made a determination of no injury pursuant to section 37-83-105(2)(a)(III), C.R.S., the Board hereby delegates authority to the CWCB Director to accept temporary loans of water for instream flow use in accordance with the procedures and subject to the limitations set forth in section 37-83-105 and to take any administrative action necessary to put the loaned water to instream flow use.

(3) Provided that the State Engineer’s determination of non-injury is still in effect, the Director shall notify the proponent and the State Engineer whether the temporary loan is to be exercised in subsequent years. Such notification shall be provided within 5 working days of the Director being notified by the proponent that the water is available for use under the temporary loan. The CWCB’s use of loaned water for instream flows shall not exceed the CWCB’s decreed instream flow amount or extend beyond the CWCB’s decreed instream flow reach at any time during the loan term, and shall comply with any terms and conditions imposed by the State Engineer to prevent injury. The purpose of this delegation is to expedite use of temporarily loaned water for instream flows by the Board.

(4) At the first regular or special Board meeting after the Director accepts or rejects an offer of a loan of water to the Board for temporary instream flow use under (1) or (2) above, the Board shall vote either to ratify or overturn the Director’s decision.

(5) The Board, Director and staff will expedite all actions necessary to implement Rule 6k.

6l. Funds for Water Right Acquisitions.

The Board may use any funds available to it for costs of the acquisition of water rights and their conversion to ISF use. The Board shall spend available funds for such costs in accordance with section 37-60-123.7, C.R.S. and any other applicable statutory authority, and with applicable Board policies and procedures.

6m. Public Input on Proposed Acquisitions.

The Board shall follow the public review process in Rules 11a. - 11c. when acquiring water, water rights or interests in water, except for temporary loans or leases as provided in Rule 6k. above and except as provided below.

(1) Prior to Board consideration of any proposed acquisition, Staff shall mail notice of the proposed acquisition to all Persons on the ISF Subscription Mailing List and the State Engineer’s Substitute Supply Plan Notification List for the relevant water division, and shall provide Proper Notice. Such notice shall include:

(a) The case number adjudicating the water right proposed to be acquired, and the appropriation date, adjudication date, priority, decreed use(s), and flow amount of the water right proposed to be acquired, and approximately how much of the water right the Board will consider acquiring;

(b) The location of the stream reach or lake that is the subject of the proposal, including, when available, the specific length of stream reach to benefit from the proposed acquisition;

(c) Any available information on the purpose of the acquisition, including the degree of preservation or improvement of the natural environment to be achieved;

- (d) Any available scientific data specifically supporting the position that the acquisition will achieve the goal of preserving or improving the natural environment to a reasonable degree; and
- (e) In addition to (a) - (d) above, for leases and loans of water, water rights or interests in water under section 37-92-102(3), such notice shall include the proposed term of the lease or loan and the proposed season of use of the water under the lease or loan.
- (2) At every regularly scheduled Board meeting subsequent to the mailing of notice, and prior to final Board action, Staff will report on the status of the proposed acquisition and time will be reserved for public comment.
- (3) Any Person may address the Board regarding the proposed acquisition prior to final Board action. Staff shall provide any written comments it receives regarding the proposed acquisition directly to the Board.
- (4) Any Person may request the Board to hold a hearing on a proposed acquisition. Such a request must be submitted to the Board in writing within twenty days after the first Board meeting at which the Board considers the proposed acquisition, and must include a brief statement, with as much specificity as possible, of why a hearing is being requested.
- (5) At its next regularly scheduled meeting after receipt of the request for a hearing, or at a special meeting, the Board will consider the request and may, in its sole discretion, grant or deny such a request. All hearings scheduled by the Board shall be governed by the following procedures:
- (a) A hearing on a proposed acquisition must be held within the 120 day period allowed for Board consideration of an acquisition pursuant to Rule 6b., unless the Person requesting the Board to consider the proposed acquisition agrees to an extension of time.
- (b) The Board shall appoint a Hearing Officer to establish the procedures by which evidence will be offered.
- (c) At least thirty days prior to the hearing date(s), the Board shall provide written notice of the hearing(s) to the Person proposing the acquisition, all interested parties known to the Board, and all Persons on the ISF Subscription Mailing List and the State Engineer's Substitute Supply Plan Notification List for the relevant water division. The Board also shall provide Proper Notice, as defined in ISF Rule 4n.
- (d) Any Person who desires party status shall become a Party upon submission of a written Notice of Party Status to the Board Office. The Notice shall include the name and mailing address of the Person and a brief statement of the reasons the Person desires party status. The Board Office must receive Notice of Party Status within seven days after notice of the hearing is issued.
- (e) The Hearing Officer shall set timelines and deadlines for all written submissions. Prehearing statements will be required, and shall include, but not be limited to, the following: 1) a list of all disputed factual and legal issues; 2) the position of the Party regarding the factual and legal issues; 3) a list identifying all of the witnesses that will testify for the Party, and a summary of the testimony that those witnesses will provide; and 4) copies of all exhibits that the Party will introduce at the hearing(s).
- (f) Any Party may present testimony or offer evidence identified in its prehearing statement regarding the proposed acquisition.
- (g) The Hearing Officer shall determine the order of testimony for the hearing(s), and shall decide other procedural matters related to the hearing(s). The Hearing Officer does not have authority to rule on substantive issues, which authority rests solely with the Board.
- (h) The Board will not apply the Colorado Rules of Evidence at hearings on proposed acquisitions.
- (i) The Board may permit general comments from any Person who is not a Party; however, the Board may limit these public comments to five minutes per Person.
- (j) The Board may take final action at the hearing(s) or continue the hearing and/or deliberations to a date certain.
- (k) Board hearings may be recorded by a reporter or by an electronic recording device. Any Party requesting a transcription of the hearing(s) shall be responsible for the cost of the transcription.

(l) When necessary, the Board may modify this hearing procedure schedule or any part thereof as it deems appropriate.

6n. Board Action to Acquire Water, Water Rights or Interests in Water.

The Board shall consider the acquisition during any regular or special meeting of the Board. At the Board meeting, the Board shall consider all presentations or comments of Staff or any other Person. After such consideration, the Board may acquire, acquire with limitations, or reject the proposed acquisition.