

# Colorado's Instream Flow and Natural Lake Level Program



Water Resources Review Committee  
Colorado Water Congress  
August 21, 2019  
Steamboat Springs, CO



**COLORADO**

Colorado Water  
Conservation Board

Department of Natural Resources

# Senate Bill 73-97

## Established Colorado's Instream Flow Program



- Recognized “the need to correlate the activities of mankind with some reasonable preservation of the natural environment”
- Vested 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.”

# **SB 73-97 established instream flow and natural lake level water rights as:**

- In-channel or in-lake appropriations of water
- For minimum flows between specific points on a stream, or levels on natural lakes
- Made exclusively by CWCB to preserve the natural environment to a reasonable degree
- Administered within the State's water right priority system

SB 97 also authorized CWCB to acquire existing water rights for ISF use.



- Major impetus for S.B. 97 was federal imposition of bypass flows on West Slope (Fry-Ark project).
- ISFs provided a way to protect water through stream reach rather than only at point of bypass.
- Provided a way to
  - maintain state control over water in Colorado.
  - address federal and public concern over lack of mechanism to keep water in stream for environment.
  - Ensure regulatory certainty for water users through continued reliance on the doctrine of prior appropriation.
- Bill also introduced in response to threats of ballot initiative to allow private ISFs.



# Legislative Changes to ISF Program

**SB 81-414** required Board to make three determinations prior to adjudicating ISFs.

**SB 86-91** clarified Board's water acq'n authority and required CWCB to request recommendations from fed agencies on ISF approps and acquisitions.

**SB 87-212** reaffirmed CWCB's exclusive authority to appropriate ISF and natural lake level water rights.

**SB 96-64** clarified water court's role in adjudicating ISF water rights; identified procedures CWCB must follow when modifying decreed ISFs; authorized CWCB to apply to water court for changes of water rights and plans for augmentation.

# Legislative Changes to ISF Program

**SB 02-156** authorized CWCB to use acquired water to improve natural environment to a reasonable degree.

## **House Bills 03-1320, 05-1039, and 07-1012:**

- authorized temporary loans/leases of water rights for ISF use for no more than 3 years in 10-year period on streams where CWCB holds decreed ISFs;
- established SE/DE notice and comment procedure for review and approval of loans, requiring finding of no injury; and
- protected loaned water rights' HCU and from abandonment.

# Legislative Changes to ISF Program

**HB 08-1280** provided protection of water rights leased or loaned long-term to CWCB for ISF use from diminished HCU and presumption of abandonment.

**SB 18-170** allows owners of new water storage capacity to dedicate mitigation releases to CWCB for protection through a specified stream reach.



# ROLE OF ISF PROGRAM IN WATER COMMUNITY

- Coordinate with federal agencies to address their resource protection goals through state-held water rights.
- Collaborate with CO Parks and Wildlife, Colorado Water Trust, conservation groups, local governments and others on protecting Colorado's rivers and streams.
- Work in partnership with water suppliers to enable water projects to move forward while ensuring protection of the natural environment.
- Work with stakeholder groups on W&S alternative processes and other projects.
- Assist with Water Plan implementation.

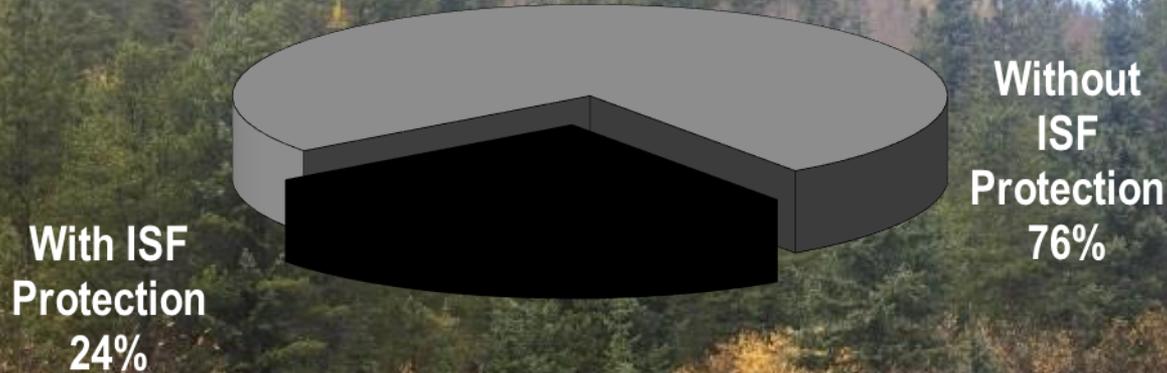


# **ISF water rights as a tool in developing alternatives to Wild & Scenic designation**

- ISF water rights can provide permanent protection of flow-related Outstandingly Remarkable Values through a decreed water right administered within Colorado's priority system.
- As part of an alternative management plan accepted by federal agencies, ISFs can eliminate potential for a federal water right on the subject stream reach if ever designated as Wild & Scenic.
- Colorado River ISFs provide this protection as part of Upper Colorado River Wild & Scenic Alternative Management Plan.

# ISF Program Statistics

39,479 miles of perennial streams



## Appropriated

Instream flow water rights on

- 1,680 stream segments,
- covering 9,650 miles of stream,
- and 482 natural lakes

## Acquired

Over 50 water right donations, purchases or contracts for water totaling 756 stream miles

# Two ways CWCB obtains ISF water rights

- **ISF Appropriations –**

- Appropriate and adjudicate a new (junior) ISF water right for the minimum required to preserve the natural environment to a reasonable degree.

- **Water Acquisitions for ISF Use**

- Accept and use existing, offered water rights in such amounts CWCB determines appropriate to preserve or improve the natural environment to a reasonable degree.



Central stoneroller Nate Cathcart photo 2010

# What does “preserve” mean?

A flow rate to PRESERVE the natural environment:

provides sufficient flow to enable fish to travel up and down a stream reach to find

- adequate food sources and
- cover to carry out reproduction; and maintains
- critical habitat (gravels necessary for fish spawning and reproduction) and
- conditions (temperature, velocity, and oxygenation) that allow production of aquatic food sources.



# What does “improve” mean?

A flow rate to IMPROVE the natural environment is higher than the preserve rate, and may result in:

- additional useable habitat for fish and their food;
- less crowding and competition for food and cover;
- more conditions that enable reproductive success, and
- lower water temperatures on hot summer days.



# ISF Appropriation Process

Any person or entity may recommend streams to be considered for ISF appropriations – recommenders are expected to:

- Collect data and quantify biological flow needs.
- Submit recommendations “with specificity and in writing” at annual January ISF Workshop.
- Identify stakeholders and participate in outreach efforts.
- Testify on natural environment and flow requirements at hearing if necessary.
- Examples of recommending entities: CO Parks and Wildlife, BLM, local governments (Larimer County), nonprofit organizations (HCCA in Gunnison County)
- CWCB uses public notice and comment procedure that may include a hearing prior to applying to water court.

The Board must make **3 determinations** before applying to water court for an ISF water right:

### **(1) A natural environment exists**

Typically identified by the presence of a coldwater fishery, but other indicators can be used (warm water fishery, riparian vegetation).



### **(2) Water is available for appropriation**

- Determined by water right and hydrologic investigations
- Daily median hydrology when available – water available 50% of time

### **(3) No material injury to other water rights will occur**

- New appropriations are junior water rights and have no effect on existing senior appropriations.
- 37-92-102(3)(b) - Recognition of existing undecreed uses and exchanges

# ISF APPROPRIATION PROCESS

## **After receiving ISF recommendations, CWCB staff:**

- Sends out public notice in March and November
- Reviews submitted data and performs a detailed water availability analysis
- Performs site visits and collects additional data
- Holds public meetings to get input on recommendations

## **Board Public Notice and Comment Process**

- Staff recommends Board form its intent to appropriate – typically at the Board’s January Meeting.
- If recommendation contested, staff negotiates settlement or Board holds hearing. (ISF Rule 5)
- Board makes 3 determinations and directs staff to work with AG’s Office on filing in water court for ISF water right.

# Instream Flow Water Acquisition Program

CWCB can acquire water

- by donation, purchase, lease, or other contractual agreement
- on a permanent or temporary basis
- from willing water right owners
- to preserve or improve the natural environment to a reasonable degree.



Cochetopa Creek – July 2002



# Types of ISF Water Acquisitions

- Permanent Acquisitions of Water (Donation or Purchase)
- Long Term Leases of Water (10+ years)
- Temporary Loans or Leases of Water



# Permanent acquisitions of water for ISF use

## Section 37-92-102(3), C.R.S.

- Donation or purchase of water
- Obtain a decreed right to use the water right to preserve/improve natural environment
- Donor or seller can retain right to use water under certain circumstances



Cimarron River  
Gunnison County

# **Long term leases of water for ISF use**

## **Section 37-92-102(3), C.R.S.**

- Can be for any time period (but prefer 10+ years)
- Can be flexible to meet lessor's needs
- CWCB must obtain a decreed right to use the leased water for ISF purposes
  - Add ISF or augmentation as a decreed use
  - Ensure no injury to other water rights on stream
- Protections for owner against abandonment and HCU reduction in years when used for ISF

# CWCB Rule 6 Review and Approval Process

For **permanent acquisitions and long-term leases of water**, Board uses two-meeting approval process (can include hearing if requested), and considers the following factors:

- Reach of stream where acquired water will be used
- Historical use and return flows
- Location of other water rights on 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 water will be available for subsequent use downstream
- Water administration issues, if any

Little Cimarron River  
Gunnison County



# Water Court Action

For long-term or permanent transactions, CWCB applies to water court, if necessary, to obtain decreed right to use acquired water for ISF purposes – can be change of water right or use of water decreed for augmentation.

In these proceedings, the Water Court will:

- (1) If a change case, verify the quantification of HCU and return flows of the acquired water right.
- (2) For all proceedings, include decree term providing for beneficial use of the HCU of the acquired water right downstream of ISF reach as fully consumable reusable water.
- (3) ENSURE **NO INJURY** TO OTHER WATER RIGHTS.

# Temporary loans / leases of water to CWCB for ISF use -- Section 37-83-105, C.R.S.

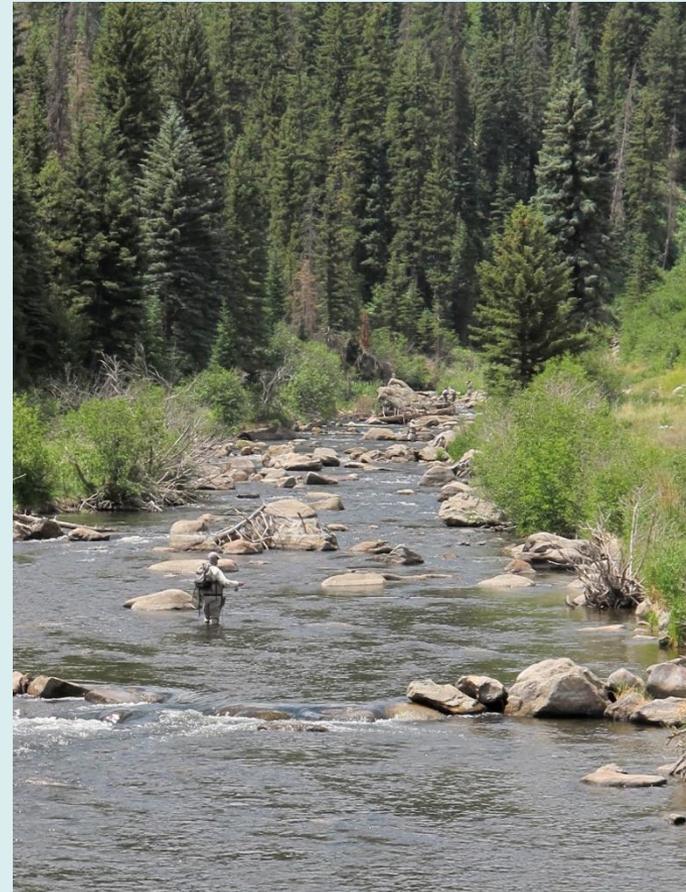


- Limited to
  - ISF use for a period of 120 days
  - 3 years of use over a 10 year period
- Can be used on any stream where CWCB currently holds an ISF water right, up to decreed amount
- State and Division Engineer can approve ISF use if no injury to other water rights – no water court process
- Protect water rights owner against abandonment and HCU reduction in years when used for ISF

# 37-83-105(2) approval process

CWCB and water right owner apply to State and Division Engineers for approval of temporary right to use loaned water for ISF purposes. Application must include:

- Evidence of water right owner's legal right to use the loaned water right;
- Statement of duration of proposed loan;
- Description of original and new proposed:
  - point(s) of diversion;
  - return flow pattern;
  - stream reach;
  - time, place, and types of use of the loaned water right; and
- A reasonable estimate of the historical consumptive use of the loaned water right.



# 37-83-105(2) approval process

- CWCB sends notice of application to ISF Subscription and SWSP Mailing Lists – statute provides 15-day public comment period to address:
  - any claimed injury that could result from the proposed loan;
  - proposed terms and conditions to prevent injury to a party's water right; and
  - any other information the commenting party wants the State and Division Engineers to consider in reviewing the proposed loan.



# 37-83-105(2) approval process

State and Division Engineers:

- Shall approve or deny the proposed loan within 20 days after date of mailing of notice, or
- within five days after receiving evidence that all persons entitled to notice have either consented to or commented on the application, whichever is earlier.
- Are not required to hold a hearing, but may if they find it necessary to address issues raised.



# 37-83-105(2) approval process

- State and Division Engineers must impose terms and conditions:
  - To prevent injury to other water rights, and
  - To ensure the loan will not affect Colorado's compact entitlements.
- CWCB Director authorized to accept temporary loan/lease upon approval by State and Division Engineers.
- At next regularly scheduled CWCB meeting, Board votes to ratify or overturn Director's decision.



## 37-83-105(2) process after approval and exercise

- Appeal of State and Division Engineer approval of temporary loan can be made to water court in relevant division.
- Party may file comments with State Engineer on potential injury to water rights due to operation of temporary loan by January 1 of year following each year loan exercised.
- Notice and comment procedures that apply to applications also apply to comments alleging injury due to loan operation.



# LEGAL PROTECTION OF ISFs

ISF water rights are adjudicated and administered within Colorado's priority system, like all other water rights in the state.

All decreed water rights are entitled to stream conditions as they existed at the time of appropriation.

CWCB has standing in Water Court to ensure changes to senior rights do not alter stream conditions in a way that injures decreed ISF water rights.



Eldorado Artesian Springs – South Boulder Creek

# LEGAL PROTECTION OF ISFs

## CWCB staff:

- reviews water court resumes each month for applications that could injure ISF water rights
- files statements of opposition to such applications
- works with the AG's Office to negotiate terms and conditions to include in water court decree that protect the ISF

## Injury can result from:

- Plans for augmentation
- Changes of water rights
- Inundation



Aldasoro Ranch Homeowners

# MONITORING AND ENFORCEMENT



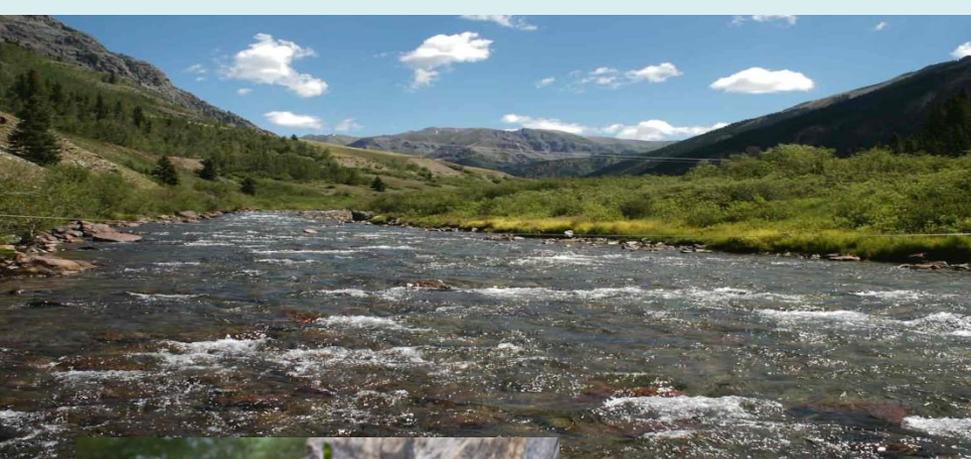
Crystal River Satellite Monitoring gage

CWCB installs new stream gages and cooperates with USGS and DWR on existing stream gages.

Real time monitoring by over 220 gages via the DWR / CWCB flow alert system—sends email alerts to staff.

Staff gages and interested stakeholders also alert staff to observed or suspected low flow conditions.

Staff coordinates with the DWR on low flow conditions and requests administration of ISF water rights when warranted.



Questions?

