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Memorandum

September 4, 2019

TO: Interested Persons

FROM: Matt Becker, Principal Research Analyst, 303-866-4785

SUBJECT: Legislative History of Colorado's Instream Flow Program

Summary

This memorandum summarizes the legislative history of Colorado's instream flow program, which is administered by the Colorado Water Conservation Board (CWCB) within the Department of Natural Resources. The program was established in 1973 by Senate Bill 73-097. Since its enactment, the CWCB has appropriated instream flow water rights on about 1,700 stream segments covering 9,700 miles. Several legislative changes to the program have occurred from 1973 to 2019.

Enacting Legislation

Senate Bill 73-097 initiated Colorado's instream flow program by changing the statutory definition of "beneficial use" to include water right appropriations by the state for minimum stream flows or natural lake levels that are required to preserve the natural environment to a reasonable degree. It also changed the definition of "appropriation" to remove the requirement that water must be diverted for beneficial use. Beneficial use is defined by state law as water use that is reasonable and appropriate under reasonably efficient practices, accomplished without waste, and lawfully appropriated. An appropriation is defined as an application of the waters of the state to a beneficial use pursuant to the procedures prescribed by Colorado water law.

Changes to Colorado Water Law

Section 37-92-102, C.R.S., describes the basic tenets of Colorado water law and includes a provision that was added by SB 73-097 that gave the CWCB, on behalf of the people of Colorado, the authority to appropriate or acquire waters of natural streams and lakes as may be required to preserve the natural environment to a reasonable degree.

Senate Bill 81-414 established the principles and limitations that govern natural stream or lake appropriations made by the CWCB, including that these appropriations:

- do not constitute a claim, bar, or use against water imported from one water division to another;
- are subject to pre-existing water uses, whether or not previously confirmed by a court or decree;
- preserve the natural environment to a reasonable degree without injury to water rights; and
- do not allow for the condemnation of private land.

Senate Bill 86-091 clarified that the CWCB may acquire water, water rights, or interests in water from any person or governmental entity as it determines may be required to preserve the natural environment. It also authorized the CWCB to initiate water rights applications, including changes of water rights or augmentation plans.

Senate Bill 87-212 clarified that the CWCB has the exclusive authority to appropriate waters that it determines may be required for minimum streamflows or for natural surface water levels or volumes for natural lakes. It also states that no other person or entity shall be granted an instream flow water right decree for any purpose. In addition, the bill required the CWCB to determine what terms it will accept in a contract or agreement for an instream flow acquisition within 120 days of a request.

Senate Bill 94-054 prohibited the CWCB from acquiring conditional water rights or changing conditional water rights to instream flow uses, except for threatened and endangered species located in the Yampa River Basin. **House Bill 00-1438** repealed this exception and specified that the CWCB is not authorized to acquire any conditional water rights or change conditional water rights to instream flow uses.

Senate Bill 96-064 authorized the CWCB to adopt additional conditions, file or withdraw statements of opposition in water court cases, and enter into stipulations for decrees or other contractual agreements related to instream flows. It also established a public notice and comment process for the CWCB, clarified the authority of water court to review instream flow determinations, and authorized the CWCB to participate in the Upper Colorado River Basin recovery implementation program for endangered fish species.

Senate Bill 02-156 authorized the CWCB to acquire instream flows through donations or from other available funds, except the CWCB Construction Fund. In addition to preserving the natural environment, the bill also expanded the CWCB's authority to acquire instream flows in order to improve the natural environment.

CWCB Instream Flow Loan Program

Section 37-83-105, C.R.S., dates back to the Session Laws of 1899 and describes the ability of water right owners to temporarily exchange or loan water to each other. **House Bill 03-1320** authorized the State Engineer to administer temporary instream flow loans for use by the CWCB. The bill authorized water right owners to loan water to the CWCB for use as instream flows for up to 120 days in any basin or county in which the Governor declares a drought emergency. The CWCB is required to compile a statement about the duration of the loan, a description of the original points of diversion, and other relevant information sufficient for the State Engineer to determine that such loan does not injure existing water rights. The loan cannot be accepted by the CWCB unless the State Engineer determines that the instream flow use will not injure existing water rights. The bill also establishes

the requirements for instream flow requests, the responsibilities of the Division Engineer in approving requests, and the appeal process before a water judge in water court.

Senate Bill 04-032 clarified that water right owners may loan their water rights to others for the purpose of agricultural irrigation for up to 180 days per year if approved by the Division Engineer.

House Bill 05-1039 repealed the requirement that the Governor must declare a drought emergency in order to initiate an instream flow loan to the CWCB and prohibited instream flow loans from being used for more than three years in a ten-year period. It also clarified that such instream flow loans are authorized on streams where the CWCB holds previously decreed instream flow water rights.

House Bill 07-1012 excluded all periods of time during which a water right is loaned to the CWCB for instream flow purposes from any historic consumptive use analysis of the loaned water right required under any water court proceeding. The bill also specified that the nonuse of a water right resulting from a loan to the CWCB for instream flow use does not constitute abandonment.

Other Instream Flow Changes to Colorado Water Law

House Bill 08-1280 made additional changes for long-term leases or loans under the instream flow program pursuant to Section 37-92-102, C.R.S. The bill required the CWCB to adopt criteria for evaluating instream flow lease or loan proposals, obtain confirmation from the Division Engineer that instream flows are administrable and capable of meeting all applicable statutory requirements, maintain records of instream flow use, install measuring devices deemed necessary by the Division Engineer, and file water court applications to obtain decreed rights to use water for instream flow purposes. Any resulting water court decrees for changes of water rights are required to quantify the historic consumptive use and are prohibited from reducing the historic consumptive use of that water right during the term of the lease or loan. The bill also specified that instream flows may be beneficially used as fully consumable reusable water downstream of the instream flow reach. Finally, the bill clarified that the nonuse of a water right resulting from an instream flow contract or agreement with the CWCB does not constitute abandonment.

Senate Bill 18-170 established a water court process by which a storage water right owner may dedicate releases from new capacity in a reservoir to the CWCB in order to reasonably avoid, minimize, or mitigate impacts on fish and wildlife within a qualifying stream reach, if certain conditions are met.

CWCB Funding for Instream Flows

Section 37-60-123.7, C.R.S., was created by **House Bill 08-1346** and continuously appropriates up to \$1.0 million per year from the CWCB Construction Fund for instream flow acquisitions used to preserve the natural environment to a reasonable degree. The bill also repealed the previous prohibition under SB 02-156 on using the CWCB Construction Fund to acquire instream flows. It should also be noted that other bills may have also appropriated money for instream flow purposes.

Senate Bill 09-235 required the CWCB to apply to the Wildlife Commission for up to an additional \$500,000 in habitat stamp funds for any year in which the CWCB expends all of the money available for acquiring instream flows from the CWCB Construction Fund.

In addition to preserving the natural environment, **Senate Bill 13-181** expanded the CWCB's authority to use the CWCB Construction Fund to acquire instream flows in order to improve the natural environment.

Senate Bill 13-175 repealed the SB 09-235 provision requiring the CWCB to apply to Colorado Parks and Wildlife for habitat stamp funds to acquire instream flows.