

Appendix 2.4 CWCB Instream Flow (ISF) Background

With the historic development of water usage under Colorado’s prior appropriation water rights system, stream flows were often affected by diversions to meet urban and agricultural water demands. Federal minimum bypass flow requirements at diversion structures did not protect streams from diversion further downstream.

In 1973, amidst a growing national awareness of the importance of environmental protection, the Colorado legislature recognized the need to “correlate the activities of mankind with some reasonable preservation of the natural environment” and passed Senate Bill 97 creating the State’s instream flow program. This program gave the Colorado Water Conservation Board (CWCB) exclusive authority to protect streamflow through a reach of stream (rather than just at a point), and to protect water levels in natural lakes. Until this law was passed, most appropriations of water (with the exception of water appropriated for hydropower) were required to divert water from the stream. Once decreed by the water court, instream flow rights are assigned a priority, just as any other water right claim, and administered within the State’s water right priority system.

As of December 2007, the instream flow program included 1,947 instream flow water rights covering over 8,500 miles of stream and 486 natural lakes. In the Roaring Fork Watershed, CWCB has acquired 64 instream flow water rights covering 372.7 miles of stream and 58 natural lakes. Appendices 2.2, 2.2a, and 2.3 contain the instream flow and natural lake tabulations for the watershed. Tables 1 and 2 below describe instream flow water rights in the Roaring Fork Watershed that have been acquired by CWCB through donation, lease, or contract.

Table 1. Status of Donations in the Roaring Fork Watershed, December, 2006.
<http://cweb.state.co.us/Streamandlake/acqDonations.htm>

Donor	Water Division	Stream	Amount Donated	Priority	Status
U.S. Forest Service	5	Hunter Creek	various amounts up to 30 cfs	1949, 1952, 1971	Decreed 80CW018
City of Aspen	5	Hunter Creek		1936, 1949	Decreed 80CW061
City of Aspen	5	Hunter Creek		1889	Decreed 80CW062
Lazy O Cattle	5	Snowmass Creek	0.25 cfs	1936	Quit Claim Deed

Table 2. Status of Long Term Leases and Contracts in the Roaring Fork Watershed, December, 2006.
<http://cwcb.state.co.us/Streamandlake/acqLeasesContracts.htm>

Lessor	Water Division	Stream or Lake	Amount	Status
Rocky Mountain Biological Labs	5	Mexican Cut Ponds # 1-17	23.09 ac-ft	99 year Lease Decreed in Case Nos. 5-W-566 through 581-72
Rocky Mountain Biological Labs	5	Galena Lake	119.62 ac-ft	99 year Lease Decreed in 5-W-582-72
City of Aspen	5	Castle Creek	up to 12 cfs	Inter-governmental Agreement

CWCB’s primary means of acquiring instream flow rights is through new appropriations. Each February CWCB hosts an Instream Flow Workshop where any person, including any governmental entity, can submit recommendations for streams and lakes to be protected. Each year CWCB files for a number of instream flow rights based on such recommendations. Before initiating a water rights filing CWCB must make three threshold determinations: “that the natural environment will be preserved to a reasonable degree by the water available for the appropriation to be made; that there is a natural environment that can be preserved to a reasonable degree with the board’s water right, if granted; and that such environment can exist without material injury to water rights” (Colo. Rev. Stat. § 37-92-102(3) (c) (Lexis 2006).

Instream flow rights are usually relatively junior in the hierarchy of users. The value of an instream flow right, therefore, does not come necessarily from its place in the priority system, but rather from the “no injury” doctrine. The legal status of instream flow rights allows CWCB to challenge any application for either a new water right or a change of an existing water right, even if the change involves a water right that is senior to the instream flow right. Under the “no injury” doctrine, all adjudicated water rights, including instream flow rights, are entitled to stream conditions as they existed at the time of appropriation (*Colo. Water Conserv. Bd. v. City of Central*, 125 P.3d at 439). Thus, a large part of CWCB’s work involves reviewing other water right applications for potential injury to its rights (D. Merriman and A. Janicki, *supra* n. 332 at 2.). If a potential injury is identified, CWCB will file a statement of opposition with the water court and seek protective terms and conditions in the court’s decree.

In addition to filing applications with the water court for new instream flow rights, CWCB can acquire interests in existing water rights. CWCB does not need to hold title to the water, but can lease or contract for water using a variety of legal mechanisms including “purchase, bequest, devise, lease, exchange, or other contractual agreement” (Colo. Rev. Stat. § 37-92-102(3) (Lexis 2006). Unlike new appropriations, CWCB is not limited to securing minimum flows that are necessary to preserve the natural environment; it can also acquire water for the purpose of improving the natural environment. Such acquisitions must stem from voluntary offers; CWCB does not have the power of eminent domain for the purpose of its instream flow program, nor may it accept donations of water rights acquired by governmental entities through condemnation proceedings. Also, CWCB is specifically prohibited from either acquiring conditional water rights or changing conditional water rights to instream flow uses.

In 2002, a severe drought year in Colorado, the Roaring Fork River went dry through the City of Aspen. A major agricultural diverter above Aspen was legally diverting the entire river by virtue of its senior water rights. The City of Aspen requested that the ditch company loan water to the stream to reduce detrimental effects on the stream ecosystem. However, there was no mechanism to keep any loaned water from being diverted by downstream water right holders. This prompted the General Assembly to revise the instream flow statutes to allow irrigators to temporarily “loan” unused water to CWCB for instream flow purposes at times when the Governor declared a drought (Colo. H. 03-1320, 64th Gen. Assembly, 1st Reg. Sess. (June 5, 2003). In 2005 this section was again revised to allow for such loans in three out of every ten years, thus eliminating the requirement that the Governor declare an emergency (Colo. H. 05-1039, 65th Gen. Assembly, 1st Reg. Sess. (Mar. 25, 2005).

By 2006, no water had been leased to the instream flow program in Colorado. The Nature Conservancy’s Colorado River Headwaters Project convened a meeting in Aspen in November 2006, bringing together stakeholders from state agencies, ditch companies, water lawyers, and water advocacy groups. From this meeting new legislation was crafted, introduced and approved by the Colorado legislature, and signed by the Governor on March 14, 2007. The bill is now Section 37-83-105(2), C.R.S. This legislation allows owners of water rights, for the first time, to loan water to CWCB without the loan counting against them in the State Engineer’s 10-year analysis of consumptive use. Furthermore, the loan to CWCB cannot be used by others to support a presumption of abandonment. With these changes, the attractiveness of water leasing to CWCB during drought times has substantially increased.

In April of 2008 the General Assembly passed House Bill 1280, to again revise the instream flow laws in order to allow for CWCB to acquire temporary water loans and leases of water rights for environmental purposes during periods of drought. H.B. 1280 amended the instream flow law itself (C.R.S. § 37-92-102), as well as the section on applicable standards for use in water court proceedings (C.R.S. § 37-92-305). Both these changes allow for an appropriator to lease or loan water rights to CWCB without the threat of abandonment. Specifically, H.B. 1280 stipulates that the “historical consumptive use” of a water right being temporarily transferred to CWCB will continue to be beneficially used, in spite of the lack of any actual consumptive use during the period of the loan or lease.