



real estate, water, business.

July 17, 2015

Colorado State Legislature  
Water Resource Review Committee  
[WaterResources@state.co.us](mailto:WaterResources@state.co.us)

**By Electronic Mail**

**Re: Agenda Item - Potential Impacts from Instream Flow Water Rights on  
Future Water Development and Compact Entitlements**

Honorable Water Resource Review Committee Members:

This letter is submitted as part of the public record for the Committee's meeting on July 20, 2015, in Durango. I represent San Miguel County on the Board of Directors of the Southwestern Water Conservation District, and I submit this letter to voice my concerns with the District's position regarding instream flow water rights and future water development and compact entitlements.

Although San Miguel County is part of the District, by state law, and the second largest contributor of tax revenues to the District, the District has repeatedly refused to represent the County's best interests. That is particularly true with respect to its position on instream flow water rights. The District is contesting the current proposed instream flow on the Dolores River and contested a previous instream flow that was decreed on the San Miguel River, over the express and repeated objections of San Miguel County. In particular, the District's position against instream flows on the Dolores and San Miguel Rivers directly contravenes the economic interests of those of us who live, work and recreate in those basins (the "Basins").

The primary purpose of these types of instream flow water rights is to provide the minimum flows necessary to preserve sensitive fish species and prevent a federal endangered species listing. The District itself is well aware of the problems and enormous costs of recovery once a species is listed because it participates financially and otherwise in the San Juan River recovery program. In fact, all recovery programs are extremely costly and create enormous obstacles to future development. Nevertheless, the District, despite its experience with costly recovery programs, refuses to acknowledge the legitimate, economic concerns of those in the Basins regarding the impact of an endangered species listing.

Apart from the endangered species issue, business owners and others in the Basins support the ISF because they understand the need for healthy, flowing rivers to support the tourism and

recreation industries that are the center of our West Slope economies, including within the Basins.

Rather than supporting our economic interests, the District has been promoting a concept that it refers to variously as a “future use allocation”, “carve-out”, a “depletion allowance” or a “subordination” Essentially, the idea is that a certain amount of water will be set aside for unknown future uses that would have a priority date ahead of an instream flow right. As San Miguel County’s representative to the District, I object to a future use allocation or similar proposal on several bases:

- It violates state anti-speculation law.
  - SWCD seeks a future use allocation to set aside water for future unknown users without a specific plan and intent to divert, store and control a specific quantity of water for specific beneficial uses. State law expressly states that this is speculation.
  - C.R.S. § 37-92-103(3)(a), which codified the anti-speculation principle, provides that no appropriation of water, either absolute or conditional, can be held to occur when the proposed appropriation is based on the speculative transfer of the appropriative rights to persons not parties to the proposed appropriation. *A speculative transfer is evident where the appropriator does not have “a specific plan and intent to divert, store ... and control a specific quantity of water for specific beneficial uses.”*<sup>1</sup>
  - The General Assembly enacted the “can and will” statute to reduce speculation associated with conditional decrees and to increase the certainty of the administration of water rights in Colorado.<sup>2</sup> The statute goes beyond the anti-speculation doctrine by requiring an applicant seeking a conditional water right decree to demonstrate that the water “can and will” be beneficially used.<sup>3</sup>
  - A future use allocation fails to meet even minimum standards for obtaining a conditional water right under state law. The District’s future use allocation concept would set aside water for future unknown users without a specific plan and intent to divert, store and control a specific quantity of water for specific beneficial uses. This is exactly the type of “speculative hoarding” that the anti-speculation principle and C.R.S. § 37-92-103(3)(a) were designed to prohibit.
- It violates the intent and purpose of S.B. 79, the legislation creating the instream flow program, and would make instream flows second-class water rights.

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<sup>1</sup> C.R.S. § 37-92-103(3)(a)(II). (Emphasis added.)

<sup>2</sup> *Raftopoulos Bros.*, 307 P.3d at 1066.

<sup>3</sup> *Id.*

- As the Colorado Supreme Court pointed out in rejecting a similar argument from the District over 35 years ago, “The legislative intent is quite clear that [ISF] appropriations are to protect and preserve the natural habitat and that the decrees confirming them award *priorities which are superior to the rights of those who may later appropriate. Otherwise, upstream appropriations could later be made, the streams dried up, and the whole purpose of the legislation destroyed.*”<sup>4</sup>
- **It creates a precedent that will threaten the efficacy and purpose of the instream flow program and likely will, consequently, increase interest in the public trust doctrine.**
- It threatens the ability of the federal government to protect species through the state water system rather than through permitting processes or other means.
- It risks the recovery of the fish species that the ISF is intended to protect, leading to enormous economic consequences in the affected basins.

On behalf of San Miguel County, I urge this Committee to reject the District proposed future use allocation concept.

Sincerely,



Jennifer Russell

cc: San Miguel County Commissioners

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<sup>4</sup> *Colo. River Water Conservation Dist. v. Colo. Water Conservation Bd.*, 594 P.2d 570, 575 (Colo. 1979).