

To: Colorado Legislative Water Resources Review Committee

From: Southwestern Water Conservation District

Date: July 20, 2015

Re: Possible Legislation for Future Use Allocations to Address Impacts of Instream Flow

An instream flow water right ("ISF"), as dictated by Colorado statute, is to preserve the natural environment to a reasonable degree. An ISF can only be held by the Colorado Water Conservation Board ("CWCB") after it conducts an administrative review and obtains the appropriation by decree in water court.

The CWCB has ISFs on more than 1,500 stream segments in Colorado covering more than 8,500 miles of stream and 477 natural lakes. At this time, the CWCB is seeking an ISF for 900 cfs in April, May and June on the Dolores River. This is the largest appropriation for an ISF in Colorado and will result in ISFs covering 180 of the 200-mile main stem Dolores River when decreed.

Initially the CWCB appropriated ISF reaches of Colorado rivers in the high country close to the streams' headwaters. As more stream segments are appropriated by the CWCB for ISFs, inevitably the appropriations will move downstream so that now the CWCB is appropriating ISFs within miles of the state line. (The proposed Dolores River ISF is within 10 miles of the state line). When the ISF reaches were higher in the watersheds, water could be put to beneficial use after it left the ISF reach. When an ISF reach is close to the state line, fewer opportunities are available to put the water to beneficial use before the water leaves the state for use by downstream states.

The statutory linchpin of the ISF program is

*Further recognizing the need to correlate the activities of mankind with some reasonable preservation of the natural environment, the Colorado water conservation board is hereby vested with the exclusive authority, on behalf of the people of the state of Colorado, to appropriate in a manner consistent with sections 5 and 6 of article XVI of the state constitution, such waters of natural streams and lakes as the board determines may be required for minimum stream flows or for natural surface water levels or volumes for natural lakes to preserve the natural environment to a reasonable degree.*

CRS 37-92-102(3) (emphasis added).

In order to "correlate the activities of mankind with some reasonable preservation of the natural environment," the Southwestern Water Conservation District ("SWCD") and the River District Water Conservation District ("CRWCD") have suggested to the CWCB that, in addition to water to preserve the natural environment to a reasonable degree, that it also appropriate with the ISF a small portion of the hydrograph of a river for use in the future for water development.

Citing Colorado Supreme Court cases, SWCD has suggested that the CWCB has the legal authority to carve out a portion of water in the ISF water right for future water development. These cases show that the CWCB, under its quasi-legislative capacity, its fiduciary duty to all the People of the State of Colorado, its exclusive role for determining ISFs, under its charge that the waters of the State must be put to their optimum use including environmental and economic concerns., and under the express language of CRS 37-92-102, may create a policy to balance the activities of mankind by including a future use allocation when the CWCB determines what should be appropriated for an ISF.

The Attorney General's office, however, has advised the CWCB that the language in the statute "to correlate the activities of mankind with some reasonable preservation of the natural environment," is a preamble reflecting the consideration of the Colorado legislature when it passed the bill creating the ISF legislation and is not an obligation on the part of the CWCB.

The CWCB further takes the view that there remains water to develop following these large appropriations at the peak of the hydrograph. This view has important policy consequences for the State of Colorado. Requiring that small future water uses obtain a reliable supply from the peak flow will require the construction of dams and reservoirs and great cost and consequence for the user of small future depletions which cannot even be measured by existing gaging technology. This policy decision may merit review by the General Assembly.

Last week, the SWCD requested that the CWCB work with SWCD and the CRWCD to develop a bill that would clarify the statute to allow the CWCB to include a future use allocation in future ISF appropriations. The CWCB heard the request as an informational item.