

Protecting Water in the Stream: Colorado's Instream Flow Program

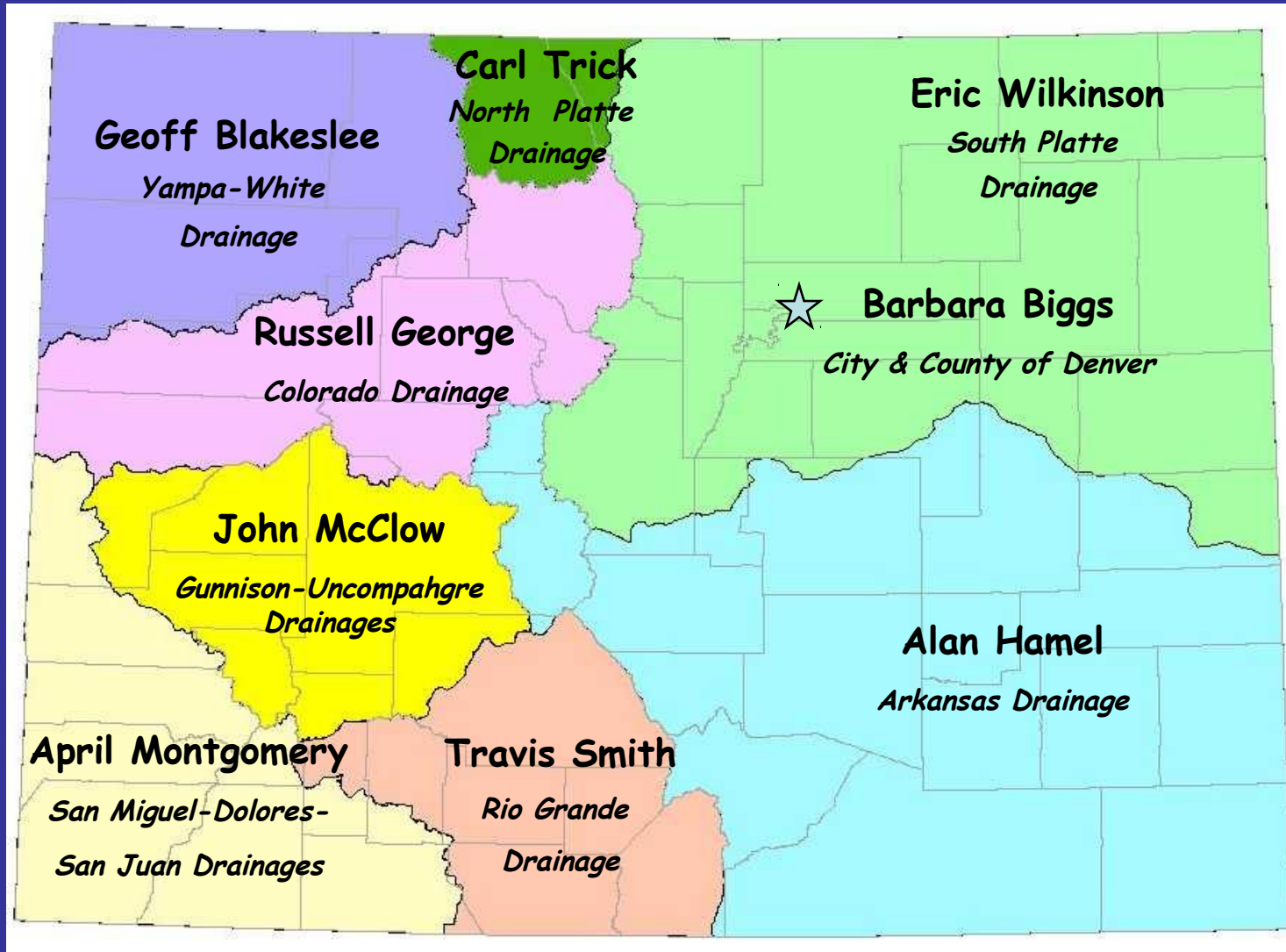


2011 Sustaining Colorado Watersheds

Avon, Colorado

October 5, 2011

Colorado Water Conservation Board



Ex-Officio Members:

Mike King, DNR Director (*voting*) -- **John Suthers**, AG (*non-voting*) -- **Dick Wolfe**, State Engineer (*non-voting*)

John Salazar, DOA Director (*non-voting*) -- **Rick Cables**, CPW Director (*non-voting*) -- **Jennifer Gimbel**, CWCB Director (*non-voting*)

Legislature established ISF Program in 1973

(Senate Bill 97)

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

Made exclusively by CWCB

- To preserve the natural environment to a reasonable degree

For minimum flows between specific points on a stream, or levels on natural lakes

Administered within the State's water right priority system

Bill also authorized CWCB to acquire water for ISF use

New ISF Appropriations

CWCB appropriates and adjudicates a new ISF water right for the **minimum** required to **preserve** the natural environment to a reasonable degree

Junior water right

Can be limited by water available for a new appropriation

May not be feasible on some overappropriated streams

- Based upon recommendations submitted by CPW, BLM, TU, ***your organization***, or any other entity or individual



Statutory Requirements

The Board must make **three 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)



(2) Water is available for appropriation

(based upon water right and hydrologic investigations performed by staff experts)

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

(new appropriations are junior water rights and will not injure existing senior appropriations)

Example of Stream Restoration + New ISF

BLM recommendations for ISF appropriation in 2012
(Kerber Creek watershed in Saguache County)

Stakeholders worked to address impacts from
historic mining

- Moved tailings

- Stopped acid mine drainage

- Treated damaged soils

- Rehabilitated stream corridors

BLM seeking ISF water rights to protect flows
through restored streams



Water Acquisitions for ISF Use

The CWCB can:

Acquire water, water rights, and interests in water **in amounts it determines appropriate** to **preserve or improve** the natural environment to a reasonable degree

Works with willing donors, sellers and lessors of water to protect stream flows.

Change water right to ISF use and maintain senior priority date

Can extend the amount of time water is legally available to existing junior ISF water rights

Can protect stream flows above and beyond existing ISF water right (“improve”)

CWCB's Water Acquisition Program

CWCB can acquire water by donation, purchase, lease, or other contractual agreement on a permanent or temporary basis from willing water rights owners. CWCB may use any funds available to it for water acquisitions.

Construction Fund, SCTF



Cochetopa Creek – July 2002

CWCB's Water Acquisition Program

An option for water rights owners to consider:

Achieve conservation goals

Potential tax credit for donating water

Way for local governments to improve stream flows with water rights not yet in use

Potential economic benefits from leasing for ISF use



Potential sources of leased water for ISF use

Farmers and ranchers who decide to lease to CWCB instead of irrigating a crop

Landowners who want to maintain flows through their property (conservation ethic, lease of fishing rights)

Local governments and water districts that own water rights that will serve future users, but are not being used today



- Federal and state agencies willing to loan or lease their water rights to CWCB to maintain stream flows

Benefits of leasing water for ISF use

Extend amount of time water is legally available to existing junior ISF water rights

Economic benefit to water rights owners who want to lease to CWCB

Option for irrigators in dry years

Provide and protect flows in restored stream reach



- Healthier streams and fish populations

Could available water rights be a good fit for the ISF Program?

Some questions to ask:

Donation, sale or lease?

Is water right on abandonment list?

Healthy record of historical diversion and use?

If lease, is water right owner willing to change water right to add ISF as a decree use?

Other water rights on stream – administration issues?

Existing ISF on stream?

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

No water court change case – State and Division Engineer can approve ISF use if no injury to other water rights

Temporary loan / lease under 37-83-105

Same approval process as used for ag to ag loan

File request for approval with Division Engineer, which must include

Evidence of water right owner's legal right to use the loaned water right;

Statement of duration of proposed loan;

Description of both the original and new proposed

points of diversion

return flow pattern

stream reach, and

the time, place, and types of use of the loaned water right;

A reasonable estimate of the historical consumptive use of the loaned water right.

Temporary loan / lease under 37-83-105

Provide written notice of proposed loan to all parties on SWSP notification list for relevant water division.

Water rights owners have 15 days to file comments with DE addressing any claimed injury that could result from the proposed loan / lease; proposed terms and conditions to prevent injury to a party's water right; and any other information the commenting party wants the DE to consider in reviewing the proposed loan / lease.

Temporary loan / lease under 37-83-105

The Division Engineer

Shall approve or deny the proposed loan within 20 days after date of mailing of notice.

Is not required to hold a hearing, but may if DE finds it necessary to address issues raised.

Must impose terms and conditions

- To prevent injury to other water rights, and

- To ensure the loan will not affect Colorado's compact entitlements.

Prior to requesting approval, CWCB staff consults with DWR about:

Current and past use of the water right if records insufficient

Potential administrative issues that could result from proposed loan

Other water rights on the stream and potential for calls

Who might object?

Any other information relevant to proposed loan

Long term leases of water for ISF use

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

Can be for any time period

Can be flexible to meet lessor's needs

CWCB must apply to water court to obtain a decreed right to use the leased water for ISF purposes

Add ISF as a decreed use

Ensure no injury to other water rights on stream

Historical consumptive use of water right protected under HB 1280

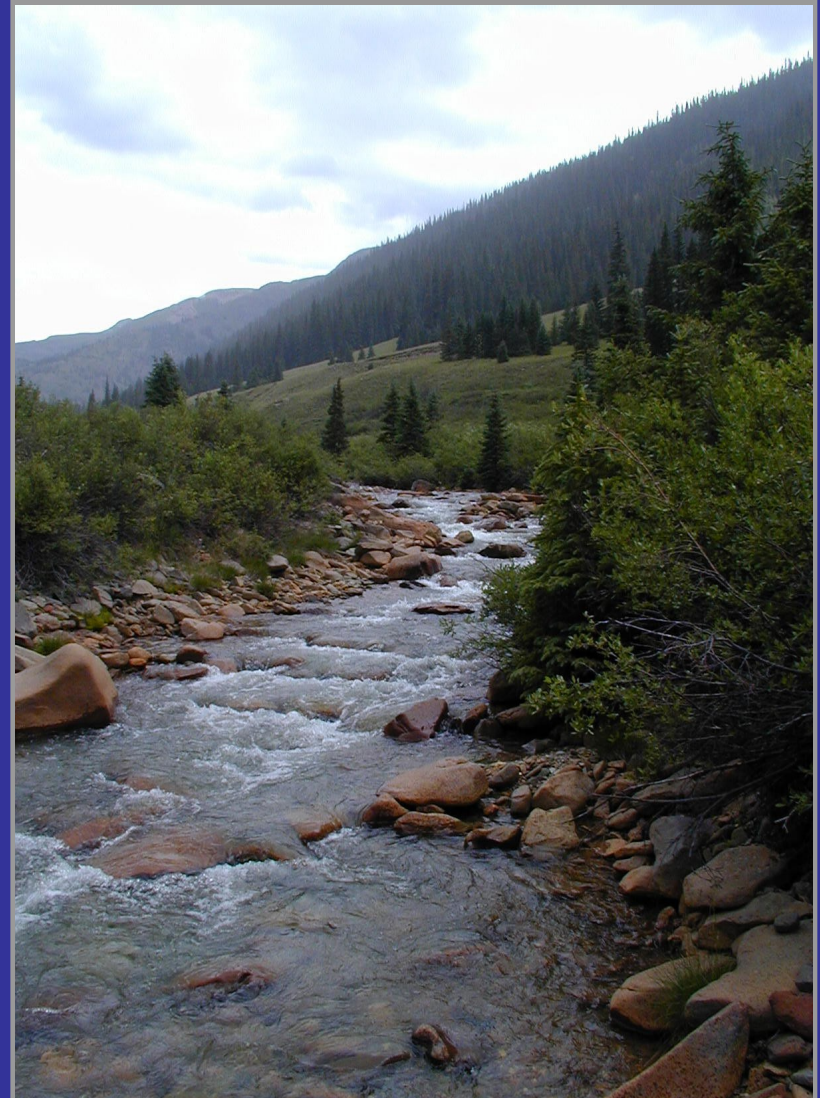
Permanent acquisitions of water for ISF use

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

Donation or purchase

Change water right to ISF use

Donor or seller can retain right to use water under certain circumstances (City of Boulder)



Water Acquisition Review and Approval Process

For both permanent acquisitions and leases, CWCB considers the following factors under ISF Rule 6

- 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



Water Acquisition Process

- Natural environment that may be preserved or improved by proposed acquisition (CPW)
- Effect of proposed acquisition on
 - Interstate compact issues
 - Maximum utilization of waters of state
 - Whether the water will be available for subsequent use downstream
 - Water administration issues, if any



Additional factors for long-term leases required by HB 1280

Extent to which the leased water will preserve or improve the natural environment to a reasonable degree

CWCB must request and review a biological analysis from CPW

Diversion records and beneficial use of leased water right

Locations of other water users on subject reach of stream

Reason(s) the water is available for lease or loan

Obtain confirmation from the Division Engineer that the proposed lease or loan is administrable

Long-term leases of water to CWCB for ISF use

Water rights owner or CWCB also can lease the HCU of the leased water right to another user downstream of the ISF reach
Under agreements for ISF leases, CWCB must

install any measuring device(s) DE needs to:

- administer the lease
- measure and record how much water flows out of the ISF reach after use by the CWCB.



The Acquisition Agreement

- Every transaction requires a written agreement.
 - Developed cooperatively with water right owner.
 - Outlines the terms and conditions of the conveyance.
 - Can address:
 - water court responsibilities
 - streamflow monitoring
 - protection and enforcement of the conveyed right
 - special terms requested by the owner, such as drought reservations.
- Enforceable by either party as a water matter in water court.

Change of Acquired Water Right

CWCB must apply to water court for a change of water right to obtain a decreed right to use the acquired water for ISF purposes.

CWCB will request the Water Court to:

- (1) verify quantification of HCU and return flows of acquired water right and
- (2) include a term and condition providing that the Board or the seller, lessor, lender, or donor of the water may bring about beneficial use of HCU of the changed water right downstream of the ISF reach as fully consumable reusable water subject to terms and conditions necessary to prevent injury to vested water rights and decreed conditional water rights.

Change of Acquired Water Right

For leases of water, CWCB will ask the water court to decree the method by which the HCU will be quantified and credited during the term of the lease. The method

shall recognize the actual amount of consumptive use available under the leased water right, and shall not result in a reduction of the HCU of that water right during the term of the lease

except to the extent such reduction is based upon the actual amount of water available under the water right.

Potential issues in changes of acquired water rights to ISF use

Objections from other water users on stream
Potential expansion of water right

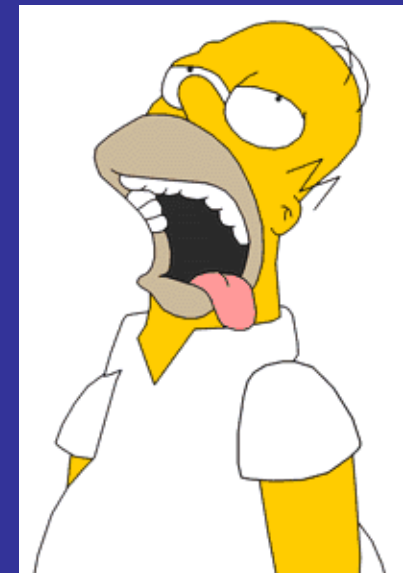
Need to maintain historical return flows

Dry-up of historically irrigated lands

Re-vegetation

Sub-irrigation

Issues related to protecting historic diversion amounts



Instream Flow Incentive Tax Credit

HB 09-1067 (39-22-533, C.R.S.)

Applies to permanent transfers only

Created market incentive to encourage voluntary water rights donations for ISFs.

Created a refundable income tax credit, equal to up to 50% of the value of the water right donated to CWCB for ISF use.

Capped tax credit program at \$2M per year.

No ISF tax credits in years when general fund appropriations not projected to grow by 6% over previous fiscal year.

Recent Acquisitions

Pitkin County Trust Agreement

Long-term loan of water rights
for ISF use

Could involve up to 35 water
rights owned by County

Breem Ditch

Collaboration with CO Water
Trust and metro district


Will re-water dry stream reach



For more information: CWCB Website

<http://cwcb.state.co.us/environment/instream-flow-program>

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Conserve, Develop, Protect, and Manage Colorado's Water for Present and Future Generations

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Home > Environment > Instream Flow Program

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- Instream Flow Program**
 - Instream Flow Appropriations
 - Water Acquisitions
 - Monitoring & Enforcement
- Climate Change
- Watershed Protection & Restoration
- Nonconsumptive Needs
- Endangered Species
- Recreational In-Channel Diversions

Instream Flow Program

In Colorado's semi-arid environment, water is scarce with many competing demands placed on it by an ever-increasing population. Recognizing the need to correlate the activities of mankind with the reasonable preservation of the natural environment, the CWCB is responsible for the appropriation, acquisition, protection and monitoring of instream flow (ISF) and natural lake level water rights to preserve and improve the natural environment to a reasonable degree.

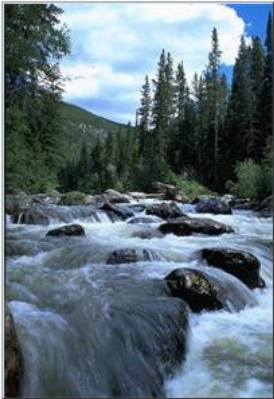
What is an instream flow or natural lake level water right?

These water rights are nonconsumptive, in-channel or in-lake uses of water made exclusively by the CWCB for minimum flows between specific points on a stream or levels in natural lakes. These rights are administered within the state's water right priority system to preserve or improve the natural environment to a reasonable degree.

What is the purpose of this type of water right?

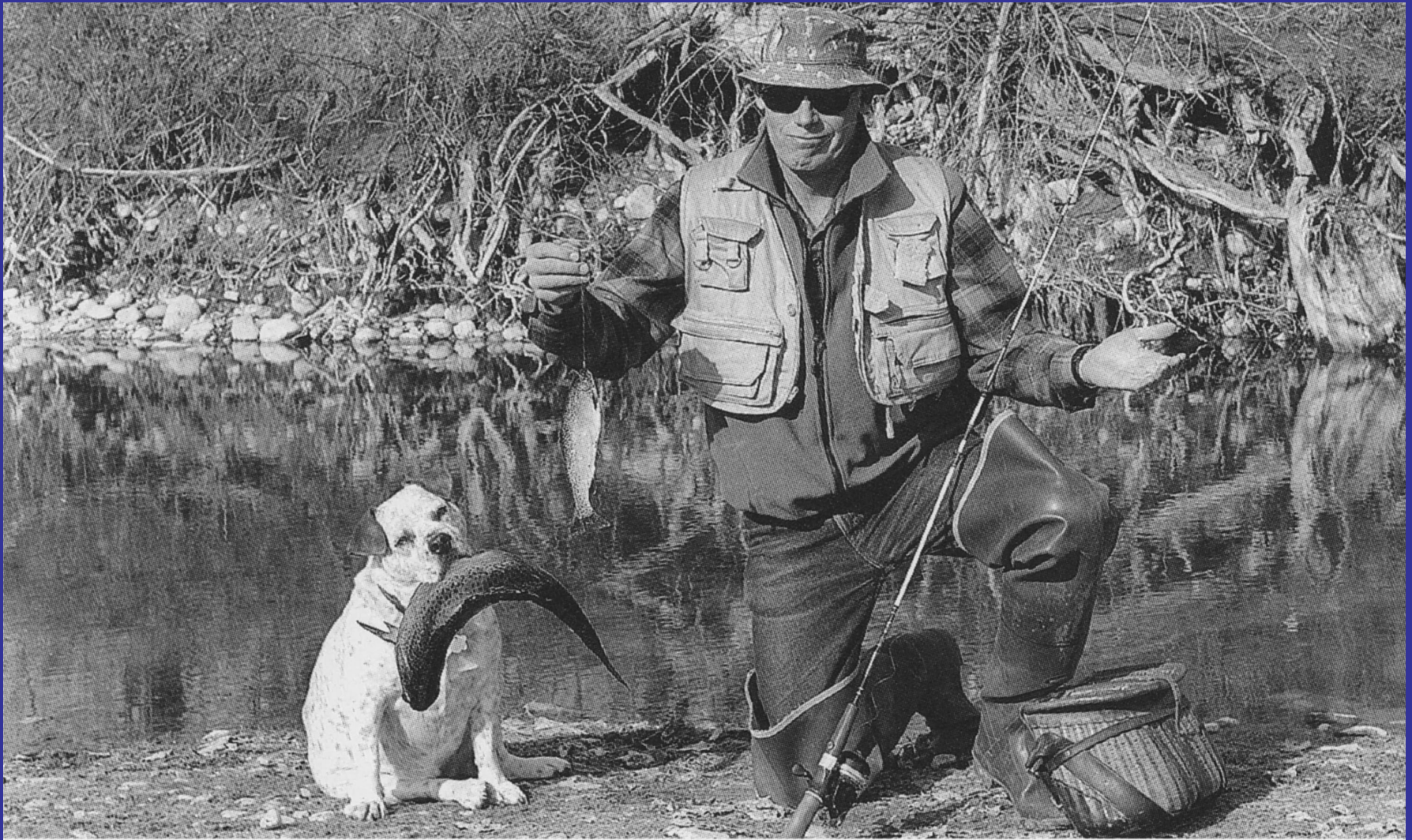
The CWCB's instream flow and natural lake level water rights protect diverse environments in Colorado including:

- Coldwater and warm water fisheries (various streams and lakes)
- Waterfowl habitat (Gageby Creek)
- Unique glacial ponds and habitat for neotenic salamanders (Mexican Cut)



Additional Information

- Instream Flow Water Rights Database
- Instream Flow Statutes
- Instream Flow Rules
- ISF Program FAQs



Rex and Bob Go Fishing

Questions?