

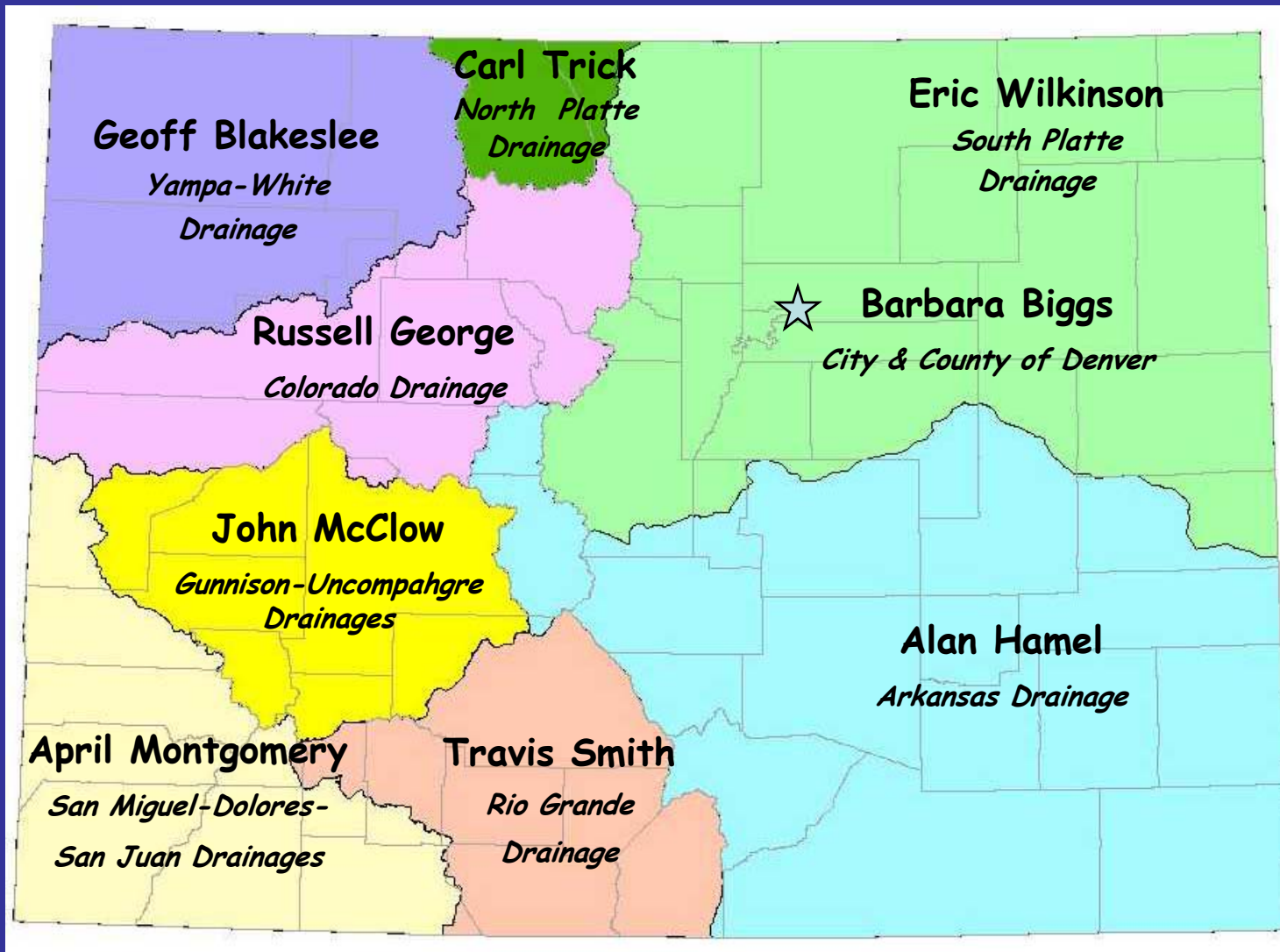
Protecting Rivers and Streams Through Colorado's Instream Flow Program



River Protection Work Group for the Animas River

November 17, 2011 Silverton, Colorado

Board Representation



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*)

ISF Program established in 1973 by 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

ISF water rights as a tool in developing alternatives to W & S designation

- ISF water rights can provide permanent protection of flow-related Outstandingly Remarkable Values (ORVs) through a decreed water right administered within Colorado's priority system
- ISFs as part of an alternative management plan accepted by feds could eliminate potential for a federal water right on the subject stream reach

Flow-related ORVs that ISF water rights can help protect

- Fish and recreational fishing
 - ISFs can preserve or improve habitat of warm water or cold water fish species
- Wildlife (otters, bald eagles)
 - By protecting fish habitat and maintaining healthy streams
- Riparian vegetation

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, or any other entity or individual (Upper CO River W/S Stakeholders Group)



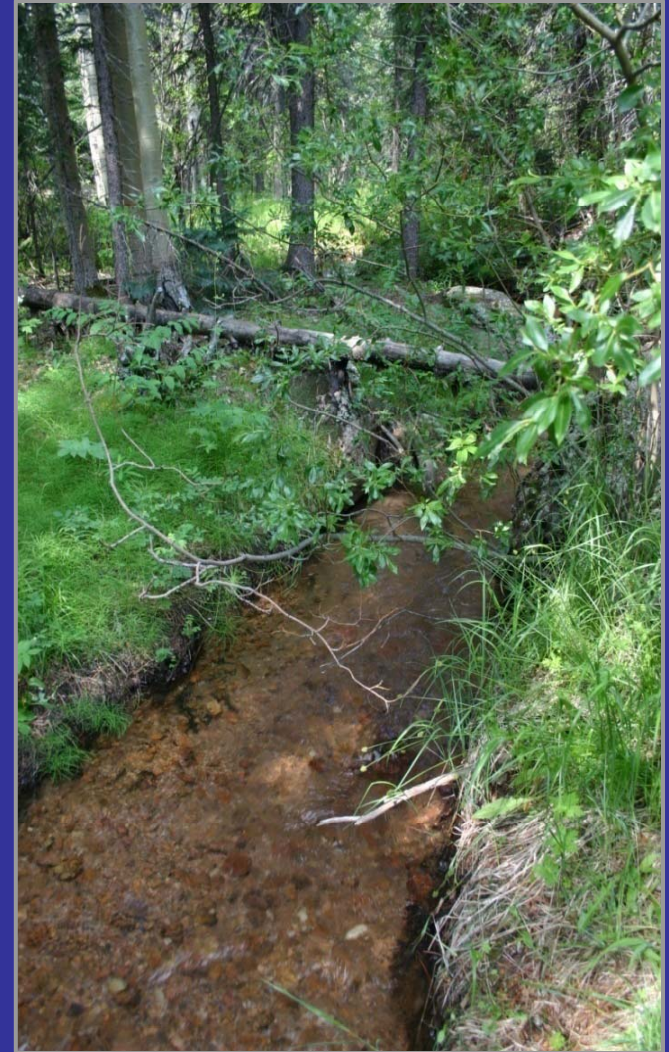
New Appropriation Process

Any person or entity may recommend streams or lakes to be considered for appropriation to preserve the natural environment.

ISF Workshop held each February to present recommendations (2/22/12).

Recommenders

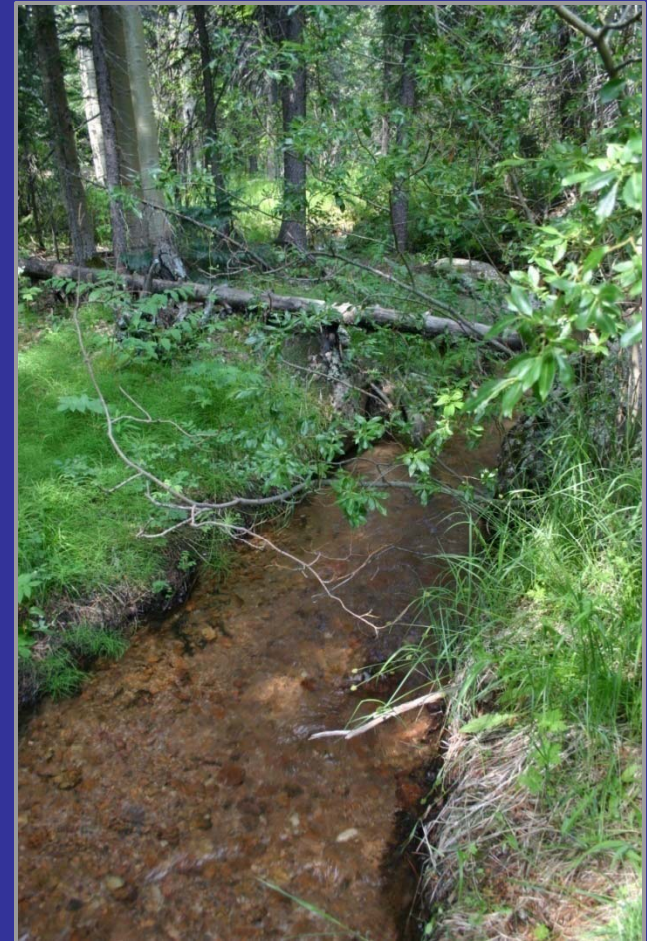
- collect data
- quantify flow requirements using R2Cross or other standard methodology – usually cold water fishery standard, but not limited
- submit recommendations to CWCB at February workshop—must be submitted *in writing* and *with specificity*.



New Appropriation Process

CWCB staff

- Informs CWCB of recommendations at March Board meeting
- Prioritizes / analyzes recommendations
- Conducts additional field work as needed
- Performs water availability analysis
- Holds public meetings to get input on recommendations
- Consults with DWR
- Brings recommendations to CWCB for appropriation – typically at the Board's January Meeting.
- This kicks off public notice and comment procedure (ISF Rule 5)
- If recommendation contested, staff negotiates settlement or Board holds hearing



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)

Upper Colorado River Stakeholders Group

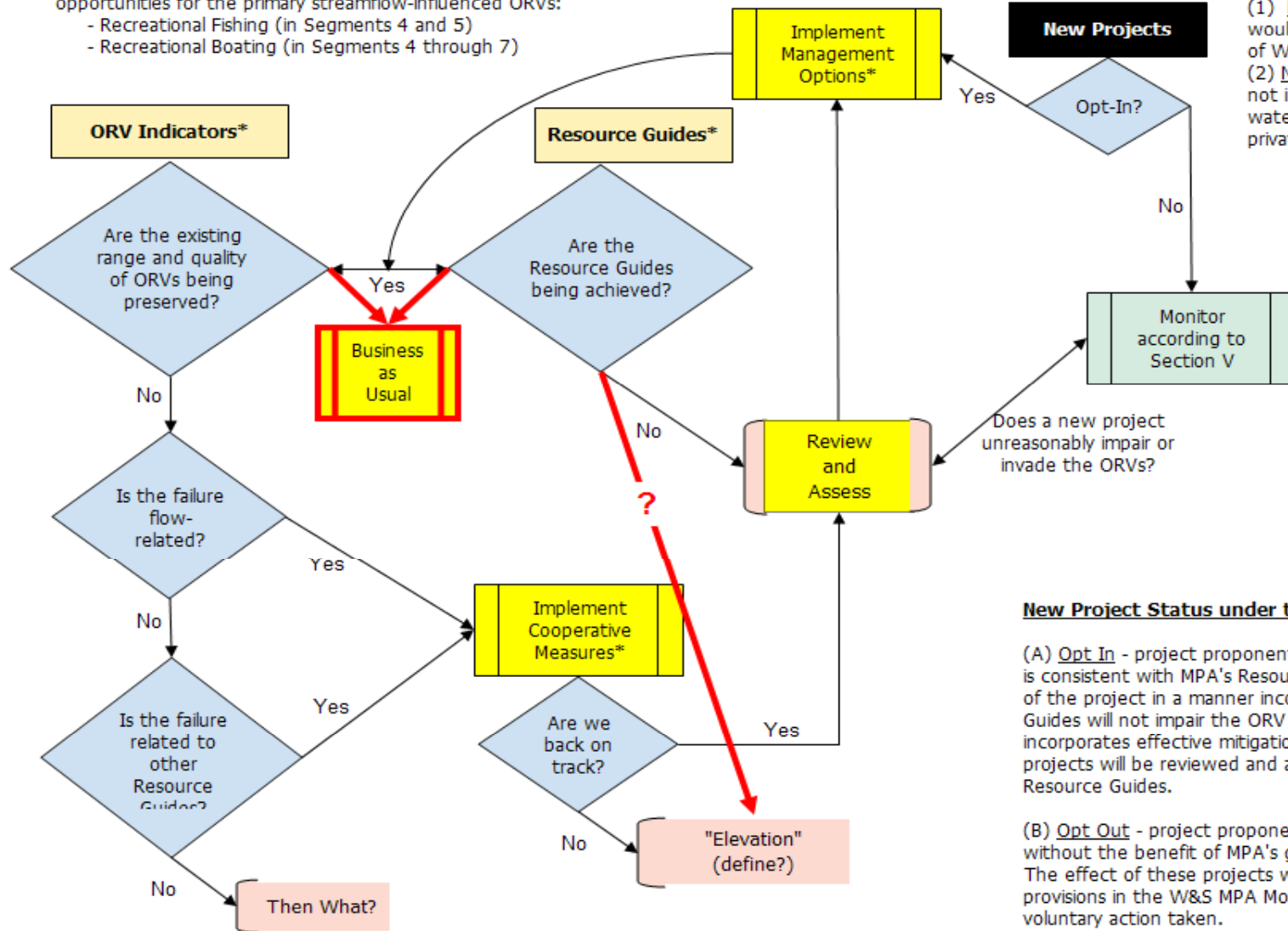
- *Goal:* Create a river management plan alternative for BLM and USFS to consider as part of planning process
- *Participants:* local governments, water users, environmental and recreation interests, landowners, state agencies
- Plan will include measures to track status of Outstandingly Remarkable Values (ORVs) and resource management protocols to support ORVs (recreational fishing and boating)

Upper CO River W&S Mgmt Plan Alternative

#1 GOAL = Preserve the existing range and quality of opportunities for the primary streamflow-influenced ORVs:
 - Recreational Fishing (in Segments 4 and 5)
 - Recreational Boating (in Segments 4 through 7)

Definition of 'New Project'

- (1) Federal nexus: any project that would require review under Section 7 of WSRA.
- (2) Non-federal nexus: any project not included in (1) above, eg: new water projects on private land, private land use activities, etc.



New Project Status under the W&S MPA

(A) Opt In - project proponent demonstrates that its project is consistent with MPA's Resource Guides, or that operation of the project in a manner inconsistent with the Resource Guides will not impair the ORV Indicators, or that it incorporates effective mitigation. The effect of these projects will be reviewed and assessed in the same loop as Resource Guides.

(B) Opt Out - project proponent decides to 'go it alone', without the benefit of MPA's guidelines for protecting ORVs. The effect of these projects will be monitored as per provisions in the W&S MPA Monitoring Plan, and appropriate voluntary action taken.

* Definitions of ORV Indicators and Resource Guides

- (1) ORV Indicators are defined as... Examples include...
- (2) Resource Guides are defined as... Examples include...

* Definitions of Cooperative Measures and Mgmt Options

- (1) Cooperative Measures are defined as... Examples include...
- (2) Management Options are defined as... Examples include...

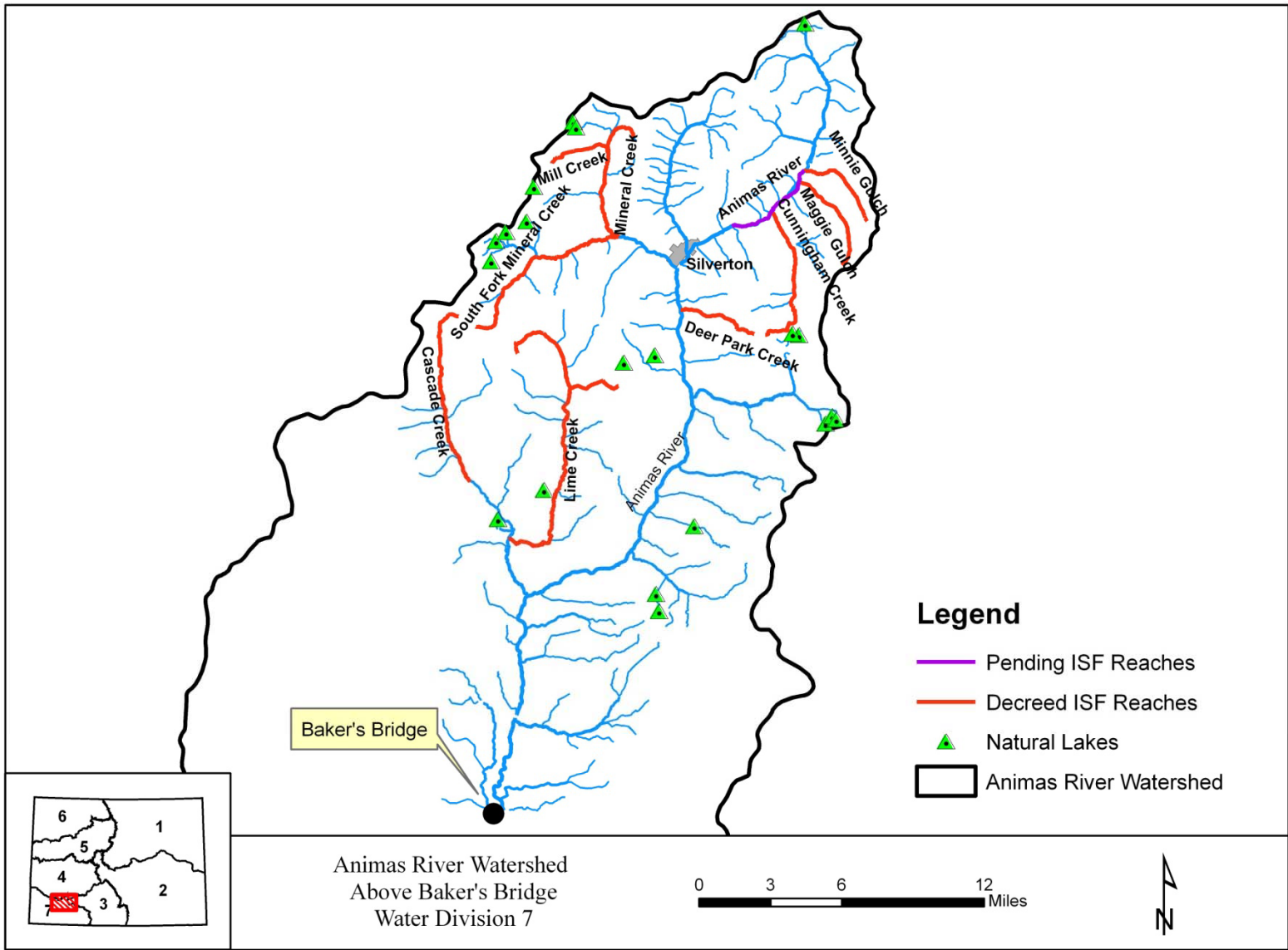
3 ISF reaches on the Colorado River

- Blue River to Piney River
- Piney River to Cabin Creek
- Cabin Creek to just u/s of Eagle River
- Stakeholder group developed ISF recommendations for base flows on each reach.
- CWCB appropriated the ISFs in July and will file water court application this month.
- Higher flows may be achieved through voluntary cooperative arrangements, potentially through the ISF water acquisition program.

The Process

- Stakeholder Group submitted Management Plan Alternative to BLM / USFS
- EIS issued; comments due in January
- Preferred alternative includes Management Plan Alternative
- Wait and see





Acquisitions of Water for ISF Use

- CWCB may 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 in amounts above existing ISF water right (“improve”)

Since 1973, the CWCB has

Appropriated

instream flow water and natural lake level rights on

- close to **1,500** stream segments,
- covering **8,700** miles of stream,
 - and **480** natural lakes

Acquired

Over **25** water right donations or long-term contracts for water totaling

500 cfs

and

9,344 AF

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.
- 2008 legislation provided funds to CWCB for that purpose (Construction Fund, SCTF).

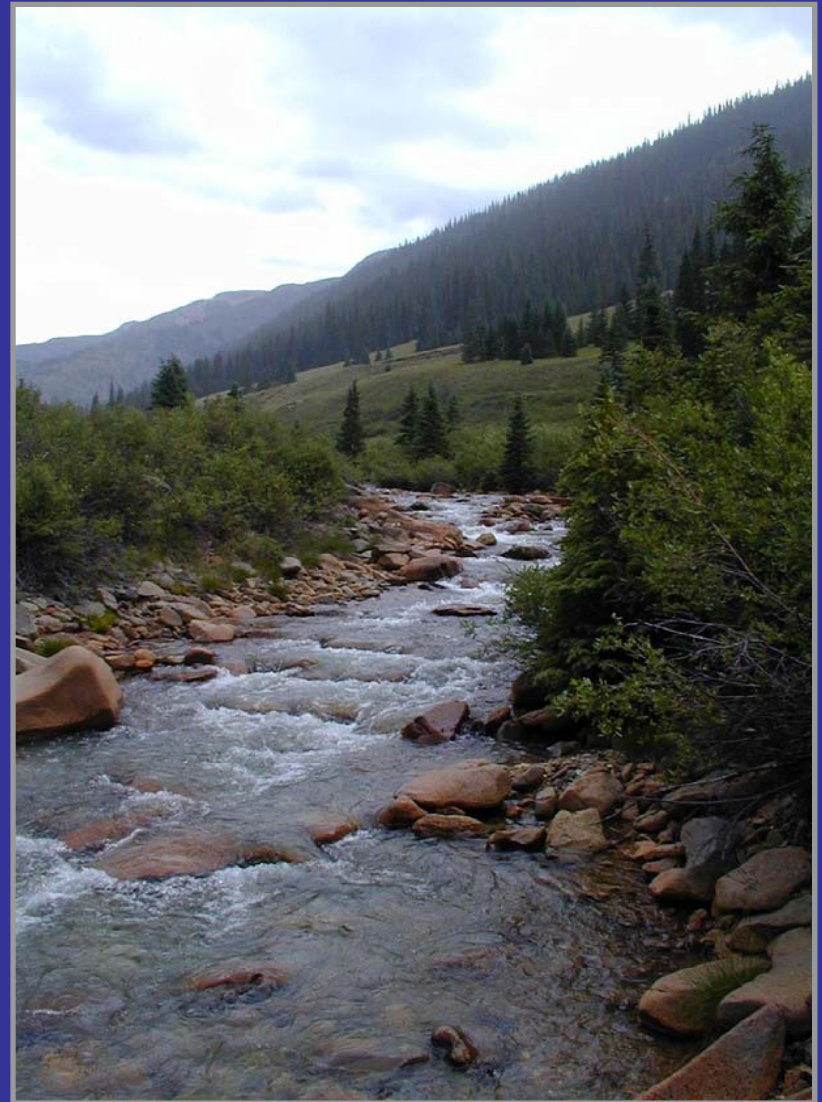


Cochetopa Creek – July 2002

Permanent acquisitions of water for ISF use

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

- Donation or purchase
- Change water right to ISF use (water court)
- Donor or seller can retain right to use water under certain circumstances (City of Boulder)



Two types of loans / leases of water to CWCB for ISF use

Temporary loan / lease under section 37-83-105

- 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 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
- Authorized by legislation in 2003 and 2005

2007 –House Bill 1012

Provided protection to water rights owners who lease or loan water to CWCB for ISF use

- Amended section 37-83-105(2) to exclude all periods of time during which a loaned water right is used by the CWCB for ISF purposes from any historic consumptive use analysis of the loaned water right required under any water court proceeding
- Amended section 37-92-103(2)(b) to designate participation in a loan of water to the Board for ISF use as a circumstance under which no intent to abandon the loaned water right shall be found.

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 information about
 - 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; and
 - A reasonable estimate of the historical consumptive use of the loaned water right.

Temporary loan / lease under 37-83-105

- Written notice of proposed loan sent to all parties on substitute water supply plan 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 c.u. of water right protected under HB 1280

2008 – House Bill 1280

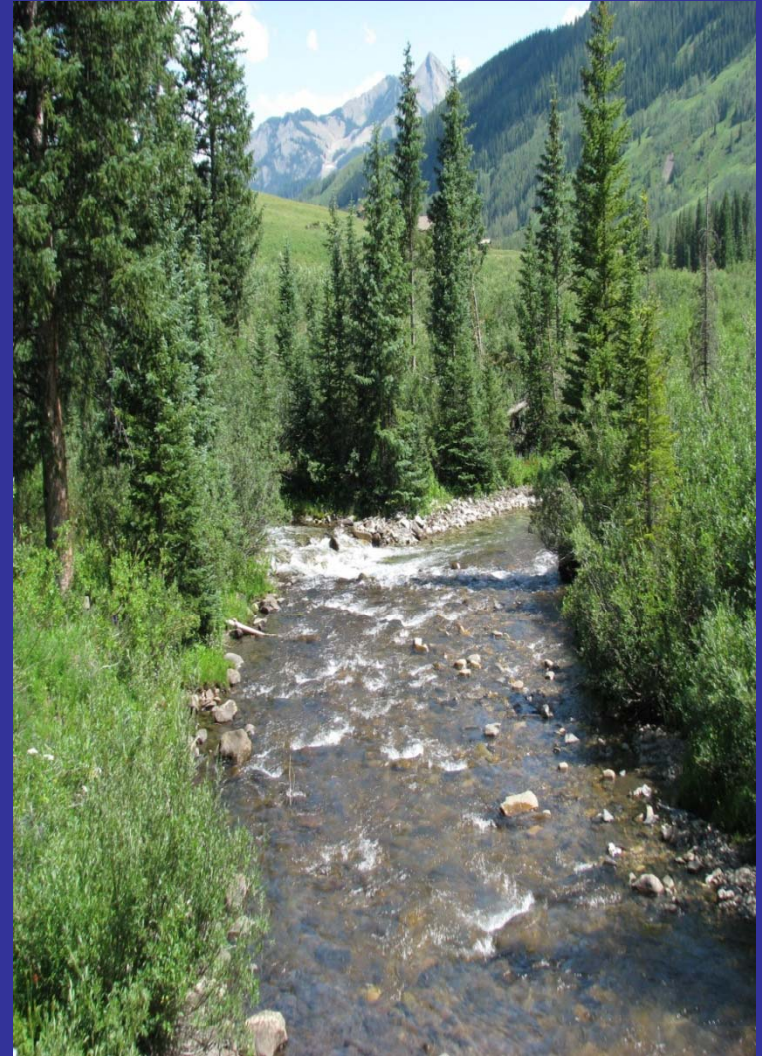
Provides protection to water rights owners who lease water to CWCB for ISF use

- Leasing water to the CWCB for ISF use will not result in a reduction of the historic consumptive use credited to the leased water right in any future water court proceeding to change that water right.
- Eliminates the presumption of abandonment for water rights that are the subject of a contract with CWCB allowing CWCB to use all or part of the water right for ISF use.

Water Acquisition Review and Approval Process

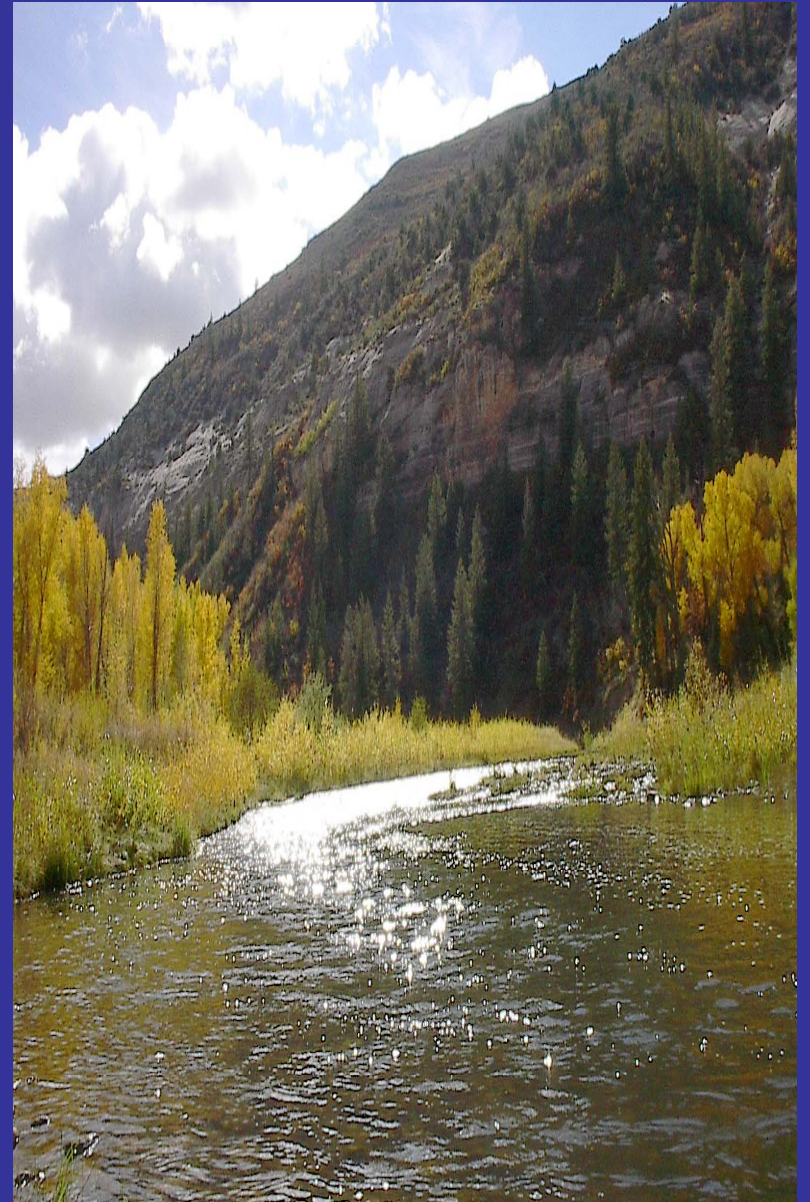
For both permanent acquisitions and leases, CWCB considers the following factors under ISF Rule 6

- 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
- 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

- CWCB must request and review a biological analysis from CPW on extent to which the leased water will preserve or improve the NE to a RD
- 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 historical consumptive use 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.

Water Court Action

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

CWCB must ask Water Court to:

- (1) verify the quantification of HCU and return flows of the acquired water right
- (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 the HCU of the changed water right d/s of the ISF reach as fully consumable reusable water

NO INJURY TO OTHER WATER RIGHTS!

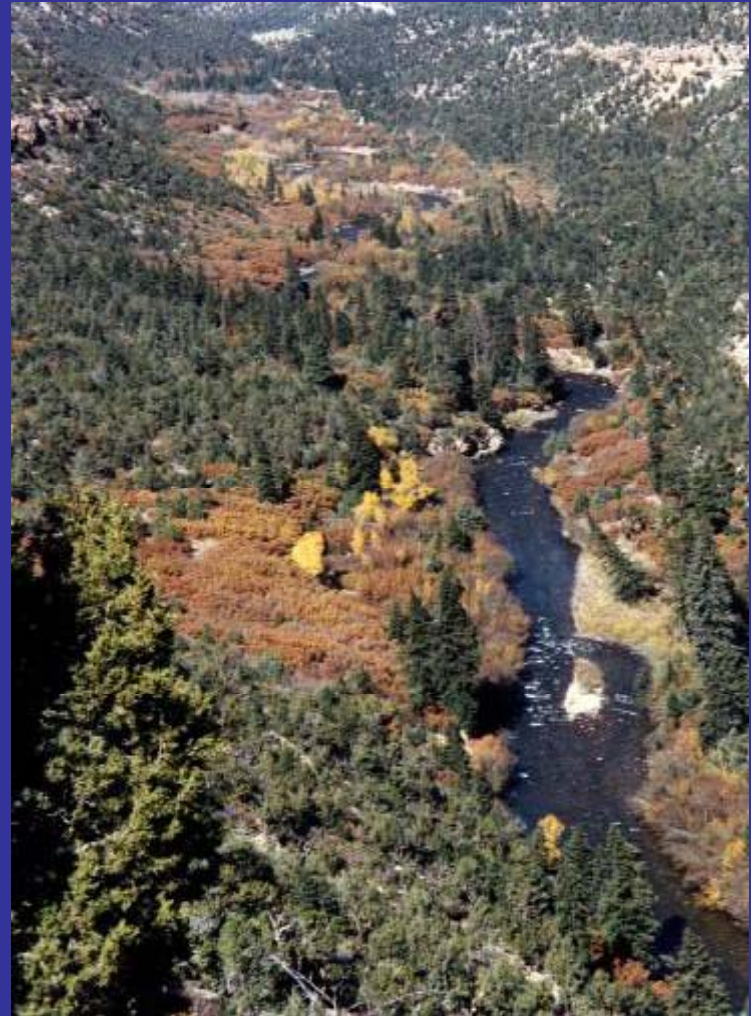
Protection of Leased Water Right's HCU

For water leases, 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 historical consumptive use 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.

Role of ISFs in Other Wild and Scenic processes

- Upper Colorado River Stakeholders Group
- Lower Colorado River Wild and Scenic Stakeholders Collaborative



Lower Colorado River

Process started in December 2009 and formed 5 working groups

- Groups developed management recommendations on how to protect various ORVs
- Recommendations regarding fish-related ORVs included:
 - Maintain and enforce existing ISF water rights
 - Work with CWCB to establish ISFs on some streams
 - Develop voluntary flow management approaches to benefit fish

Questions?

