

InStream Colorado

Colorado's Stream and Lake Protection Program

Vol. 3, Issue 2 April 2000

CWCB's exclusive authority to appropriate ISFs recognized

Editor's Note: The past issues described the efforts by Felix Sparks and others that resulted in the establishment of the instream flow (ISF) water rights without the need for diversion structures. The past articles also described the amendments to the ISF statute and their historical significance. This Issue highlights private ISF claims and the resulting amendment to the statute. The information below is based on Mathew McKinney's doctoral dissertation, Water Court, Supreme Court and CWCB documents, and communications between the CWCB staff and the Attorney General's Office. The next issue will cover the most recent amendments to the ISF statute.

By Bahman Hatami

InStream Colorado Editor

In 1987, the controversy over federal instream flow claims was coupled with another issue that the CWCB and many water user groups contested – the appropriation of instream water rights by private individuals and local entities. One application in particular that brought this issue to the forefront, was Fort Collins' application. In late 1986, the City of Fort Collins filed an application on the Cache la Poudre River for recreational, piscatorial, fishery, wildlife, and dilution for sewage treatment uses on a stretch of the river specified as, "Poudre River Recreation Corridor". The CWCB argued that this was an application for an instream flow water right and that the CWCB was the only entity empowered under state law to hold such a right.

The CWCB withdrew its opposition when Fort Collins amended its application to specify two specific points of diversions in 1988. Some years later, the water court awarded a decree (after being tested by the Supreme Court), recognizing the two diversion structures specified in the Fort Collins application as 'control structures'. In effect, Fort Collins received a decree for flow through two diversion/control points

and not for an instream flow water right, which does not require a diversion or control structure.

The application filed by Fort Collins was not the first private instream flow claim. In September 1973, shortly after the passage of the ISF Legislation, a number of Gunnison County residents (Joseph Vader et al.) filed for instream flow water rights on Lottis Creek, Cross Creek, Cameron Creek and Union Creek – all tributaries of the Taylor River (Case No. W-1987, Water Division 4). Joseph Vader, et al. owned and leased land located such that the streams for which they were seeking instream flow water rights flowed through or bordered properties that they owned or leased. They had used their lands since the early 1900's for agricultural, livestock and recreational purposes, although they had not actually diverted

water. In their application, Joseph Vader, et al. stated that the use of water claimed was non-consumptive. They requested that the water in the streams not diminish in quantity below the claimed amount, or diminish in quality from its natural and historic condition. Joseph Vader, et al. received a decree in 1974.

The CWCB, having been vested with the authority of appropriating ISF rights only a short time prior, did not become aware of this application until long after the statute of limitations had barred the CWCB from seeking to vacate the judgment. Some 17 years later, Arapahoe County, which had purchased an interest in the Union Park Reservoir applications, filed a motion requesting that the water court vacate the W-1987 decree. Arapahoe County claimed that the water rights decreed in Case W-1987 were riparian water rights that should not have been recognized by law. Arapahoe County claimed that the court lacked jurisdiction to issue the decree. Arapahoe County further alleged that the rights were void and unenforceable, claiming the water court resume notice was insufficient. The water court denied Arapahoe County's motion in 1991. The Supreme Court later upheld the water court's decision by specifically affirming that: (1) the award had been for instream flow rights and thus was not outside the jurisdiction of the court; (2) the fact that the court might have erred in issuing the decree did not render it void; and (3) the resume notice was adequate.

Consequently, the rights decreed to Vader et al. are recognized instream flow rights whose validity is protected by the doctrine of res judicata.

In 1986, the Upper Gunnison River Water Conservancy District (UGRWCD) filed two applications in the Division 4 water court,

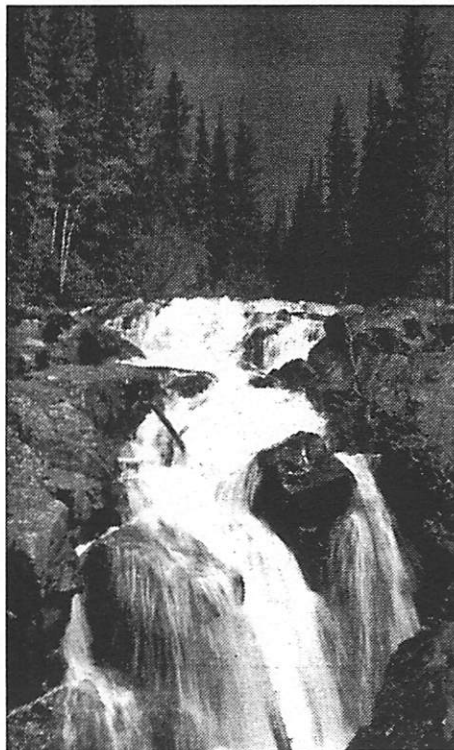


Photo courtesy of Bill Green

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Emerging issues bring new challenges for CWCB



The first quarter of 2000 has been busy for Colorado's Stream and Lake Protection Program. *New Appropriations* - In January the

Colorado Water Conservation Board (CWCB/Board) declared its intent to appropriate new instream flow (ISF) water rights in the Fourmile Creek basin in Water Division 2 and the Parachute Creek basin in Water Division 5. This Board action initiated the public process for new ISF appropriations as provided for in the rules the Board adopted in October 1999.

The deadline for contesting the new ISF recommendations was March 31, 2000. There was no opposition to the Division 5 recommendations and the Board will be asked to take final action on these recommendations in May. The Division 2 recommendations, however, were contested and will put the Board's rules dealing with contested recommendations to the test.

The time for requesting "Party" status for a hearing has past and a number of parties have joined the process. Several local property owners have requested "Participant" status so they can appear before the Board to discuss the proposed appropriations. At our May meeting in Alamosa, we will ask the Board to designate a hearing officer and to adopt a schedule of

meetings that will include informal meetings, pre-hearing conferences and an actual hearing in September or October.

Emergent Issues - Other policy issues the Board is addressing include working to settle water right applications we have opposed by using the Injury with Mitigation concept. In these cases the mitigation must sufficiently offset the injury caused by the proposed project for the Board to find that the natural environment is still being protected to a reasonable degree. We are also examining the impacts of several proposals to establish water parks for kayaking and fishing. While state law does allow for this type of use, the Board is concerned about whether the new proposals fit within the existing law. Those interested in the ISF Program and instream issues will want to follow these developments closely.

Stream Gaging - We are also expanding our efforts to protect the Board's ISF water rights with new and improved stream gages. Using funding from the Severance Tax Operational Account we have enhanced our statewide stream gaging, data collection and monitoring efforts. A committee was formed within the Board consisting of staff working on Decision Support Systems, Flood Protection, and Stream and Lake Protection programs. The goal of the committee has been to develop a unified approach to collecting stream flow and other water resource data that will be useful to the Board in carrying out its mission to protect and conserve the state's water resources.

In the past two years, approximately \$80,000 has been spent to enhance data collection efforts statewide. The CWCB has coordinated with the State Engineer's office and the United States Geological Survey to upgrade and construct new Satellite Telemetry Gaging stations that can be used by the CWCB and other water users, planners and administrators throughout the state.

This year the committee is upgrading more stream gaging stations with Satellite Data Collection Platforms (many in the upper Colorado River Basin) and assisting Otero County in upgrading a flood warning gage and a flood warning system.

The CWCB intends to continue developing its capabilities to collect stream flow and other water resource data to assist in the state's Decision Support Systems, Stream and Lake Protection, and Flood Protection efforts. If you have questions or comments about this data collection effort, know of a stream where you believe data collection would be beneficial and/or could provide funding to support the installation and/or the annual operation and maintenance of a gage, or have a particular gage that you feel should be upgraded, please contact Jeff Baesseler who is leading this effort for the CWCB.

Again, thank you for your interest and continued support of Colorado's Stream and Lake Protection Program.

- Dan Merriman, Director
Stream and Lake Protection Program

ISF history . . .

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seeking certain water storage rights and water exchanges that would enhance fishery and recreation needs in the Taylor and Upper Gunnison Rivers. The CWCB objected to these cases because these rights appeared to be, in effect, instream flow rights. However, the CWCB withdrew its objection upon entry of Judge Brown's 1988 ruling that the rights sought in these two applications did not constitute instream flow appropriations. The ruling indicated that these rights did not award a minimum flow amount, but rather permitted the applicant to store water in Taylor Park

Reservoir for later release to create optimal flows in the Taylor River for fisheries and recreational rafting.

To settle the issue and keep private instream claims from springing up throughout the state, the legislature enacted Senate Bill 212 in 1987. The new law affirmed that the CWCB is the only entity authorized by state law to appropriate or acquire water for instream flows in a stream channel without a diversion or control structure. However, it also provided security to those persons or entities (including the federal government) that donated water rights or contracted with the state for instream flow enhancement by stating that "Any contract or agreement executed between the board and any person

or governmental entity which provides water, water rights, or interests in water to the board shall be enforceable by either party (in water court) under the terms of the contract or agreement." Thus the amendment provided an opportunity for federal land management agencies, local governments, public interest groups, and private individuals and groups to donate water rights to the instream flow program and to have standing to enforce those rights when necessary. It thereby appeased the fears of these various groups that the CWCB might not always strictly enforce the acquired water rights. ♦

Love for flowing rivers and serving the public – natural for Justice Hobbs

Colorado Supreme Court Justice Greg Hobbs is a familiar face in the water community. Before Justice Hobbs was appointed to the Colorado Supreme Court on April 18, 1996, he was a senior partner at the law firm of Hobbs, Trout & Raley, where he served primarily as general counsel to the Northern Colorado Water Conservancy District (NCWCD). Hobbs practiced law for 25 years prior to becoming a judge, specializing in water, environment, land use, and transportation. He graduated from the University of Notre Dame, majoring in history, and from the law school of the University of California at Berkeley. He began his legal career in 1971 as law clerk to Judge William E. Doyle of the U.S. Tenth Circuit Court. He then worked as an enforcement attorney for the regional office of the U.S. Environmental Protection Agency.

He joined the Colorado Attorney General's Office on January 10, 1975. He helped to form the natural resources section of that office with his colleague from EPA, David Robbins. In 1979, he entered private practice with the law firm of Davis, Graham, and Stubbs for 13 years before the formation of Hobbs, Trout & Raley in October of 1992. Hobbs has always been interested in teaching. Before beginning his legal career, Hobbs taught sixth grade in New York City and served with the Peace Corps in South America in an educational television program for elementary schools. He taught environmental law to graduate students at the University of Denver for five years while in private law practice.

Hobbs highly values the years he worked at the Attorney General's office. During that time, he collaborated with David Robbins on all issues of natural resources law affecting Colorado, including the instream flow program. He recalls leaving the AG's Office "with a love for Colorado water history, law, and politics." At Davis, Graham & Stubbs, Hobbs began as assistant general counsel under John Sayre for the NCWCD and became general counsel upon Sayre's retirement. Hobbs was instrumental in acquiring the necessary permits and approvals for the Windy Gap Project, and the NCWCD's Southern Water Supply Pipeline that brings water to Loveland, Boulder, Broomfield, Greeley, and Fort Morgan.

Hobbs also includes his role in the 1986 Poudre River Wild and Scenic River Act and the 1993 Colorado Wilderness Act as major accomplishments while serving as counsel to the NCWCD. He helped then-Congressman Hank Brown with the negotiations for designation of seventy-five miles of the Poudre from its source to near the mouth of the Poudre Canyon. "Working with the Colorado Environmental Coalition, we drafted the law to preserve senior water rights while recognizing a new water right for preservation of the flowing river and leaving open the opportunity for a new reservoir below the Wild and Scenic River and upstream of Fort Collins," Hobbs recalls. He assisted Senators Hank Brown and Tim Wirth in resolving water issues connected with the 1993 Wilderness Act. "That law resulted in designating 750,000 acres of additional headwaters wilderness in Colorado, without the creation of new federal reserved water rights."

Hobbs has written many professional papers emphasizing protection for water rights and the environment. His poetry reflects a love of "singing rivers." He feels "very lucky to have represented a Board [NCWCD] that factored environmental protection into its decision making." In negotiating the Windy Gap diversions with the western slope, "the NCWCD Board was the first water user entity to incorporate endangered species protection of the Colorado River



fishes," Hobbs recalls. "The [NCWCD] Board also agreed to subordinate the Windy Gap water right (a 1967 priority) to a negotiated 1981 instream flow water right of the Colorado Water Conservation Board for twenty-four miles of the gold medal fishery on the Colorado River." He remembers both agreements as essential to the overall mitigation plan for the Windy Gap Project that resulted in western slope and federal agency approval.

Hobbs has a high regard for the role of the Stream and Lake Protection (ISF) Program in Colorado water law. "It was a brilliant breakthrough accomplished by the Colorado General Assembly," he says. "It took a 19th century law into the new millennium. Now this unique type of water right is a well-recognized use, which shows how adaptive Colorado water law can be," he adds. Hobbs' views the legislature's choice of CWCB as the appropriator to be a logical choice. "It holds the ISF water rights on behalf of the people as a whole, consistent with the priority system and Colorado's nine interstate compacts," he emphasizes. Hobbs has no doubt that the ISF Program will continue to address the values and needs of Colorado's citizens in the future. He sees opportunities for GOCO and the CWCB to cooperate in protecting streams and open space. "I hope that the US Forest Service will utilize the ISF Program, as the Colorado Legislature explicitly invited the federal agencies to participate with the CWCB," he adds.

Hobbs enjoys the wide variety of matters that come before the Colorado Supreme Court. "Every case is a window on Colorado," he says, and adds, "it is a great privilege to work with the other six justices to do the best we can." Hobbs views water law as "a continuous flow from Territorial days into the future." His hobbies are poetry and southwestern United States history. His wife, Bobbie, is the director and board president of Children's Garden Montessori School in Denver. Their daughter, Emily, is graduating from the University of Denver Law School this year, and their son, Daniel, is an organic vegetable grower in northern New Mexico. They have three grand children: Joni, Kyle, and Shannon.♦



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Colorado Water Conservation Board - Director Peter Evans

Colorado's Stream and Lake Protection Program
Director Dan Merriman

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Editor Bahman Hatami

CALENDAR

MAY

- 8-9 Water Quality Control Commission Meeting, Denver. Information: Diana Glaser, (303) 692-3469
- 19 Colorado Ground Water Commission Meeting; Denver. Information: Marta Ahrens, (303) 866-3581
- 22-23 CWCB meeting, Alamosa. Information: Andrea Wygle, (303) 866-3441

JUNE

- 5-6 Water Quality Control Commission Retreat, Glenwood Spring. Information: Diana Glaser, (303) 692-3469
- 6 Colorado Board of Examiners of Water Well Construction and Pump Installation Contractors Meeting, Denver. Information: Gina Antonio, (303) 866-3581
- 7-9 Water and Growth in the West Conference. Natural Resources Law Center's 21st Annual Conference, University of Colorado School of Law. (303) 492-1272

- 19-20 Water Quality Forum Retreat, Winter Park. Information: Lisa Carlson, (303) 820-5650

JULY

- 10-12 Water Quality Control Commission Meeting, Denver. Information: Diana Glaser, (303) 692-3469
- 16-20 American Fisheries Society Annual Meeting, Telluride. Information: www.fisheries.org
- 24-25 CWCB meeting, Gunnison. Information: Andrea Wygle, (303) 866-3441
- 26-28 25th Annual Colorado Water Workshop, Western State College, Gunnison. Information: Lucy High, (970) 641-8766

What's new?

Good Luck Trina. Farewell Kathy Kanda. Late last year and early this year, *InStream Colorado* lost its production and editors-in-chief, Trina Ortega and Kathy Kanda. Trina, who was the Deputy Director of Communications for the Department of Natural Resources (DNR), moved with her husband Marty to Carbondale, Colorado. Kathy Kanda, who was the Director of Communications for DNR, decided to start life all over—first by going fishing this summer and then attending the University of Denver Law School this fall. We will miss both Trina and Kathy who were instrumental in keeping *InStream Colorado* flowing since the first issue was published in July 1998. Trina donated her time for the editorial and production of the January issue of *InStream Colorado*. We wish Trina and Kathy much success and prosperity in their new endeavors.

Welcome New CWCB Members.

Governor Owens re-appointed Bob Burr as the North Park representative and appointed two new CWCB members effective March 2000. Eric Wilkinson who is the Northern Colorado Water Conservancy District General Manager will represent the South Platte Basin. Keith Catlin, a longtime farmer and rancher and the current president of the Uncompahgre Valley Water Users Association will represent the Gunnison River Basin. We look forward to working with them in the coming years.

InStream Colorado

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