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Colorado Water Conservation Board

BEFORE THE COLORADO WATER CONSERVATION BOARD

STATE OF COLORADO

Opposition to the Prehearing Statement of the Upper Yampa Water Conservancy District

IN THE MATTER OF AN INSTREAM FLOW APPROPRIATION IN MORRISON CREEK,
WATER DIVISION 6

Flying Diamond Resources and James A. Larson ("Proponents") submit the following legal memorandum in opposition to the Prehearing Statement filed by the Upper Yampa Water Conservancy District ("District") on July 8, 2010.

In its prehearing statement, the District included as an alternative proposal a request that the Colorado Water Conservation Board ("CWCB") approve its Request to Inundate a portion of Silver Creek, dated July 7, 2010 ("Request to Inundate"), and excuse the District from any future obligation to request to inundate a new instream flow right that the CWCB may appropriate in Morrison Creek. The Proponents respectfully submit that the District's alternative proposal (1) falls outside of the scope of matters that may be raised at an ISF hearing; (2) is inconsistent with the stipulation executed by the CWCB and the District in Case No. 07CW61; (3) is premature at this pre-permitting stage in the District's Morrison Creek Reservoir project; and (4) violates the public review process and other procedures required of an inundation request.

- 1. Issues that may be raised at an ISF hearing or in a pre-hearing statement are limited to those relevant to the statutory determinations required of the CWCB pursuant to § 37-92-102(3)(c). The District's Request to Inundate is entirely separate from and unrelated to the issues that may be raised at the Morrison Creek ISF hearing.**

The ISF Program Rules state that "[i]n a hearing on a contested ISF appropriation, a Party may raise only those issues relevant to the statutory determinations required by §37-92-102(3)(c), C.R.S. and the required findings in Rule 5i." Rule 5j(3). The three required statutory determinations are that: (1) there is a natural environment that can be preserved to a reasonable degree with the Board's water right if granted; (2) the natural environment will be preserved to a reasonable degree by the water available for the appropriation to be made; and (3) that such environment can exist without material injury to water rights. C.R.S. § 37-92-102(3)(c). The District's Request to Inundate a portion of Silver Creek is not relevant to these statutory criteria. Therefore, the District's request may not be raised at the hearing nor considered by the CWCB as part of its determination whether to appropriate an instream flow on Morrison Creek.

The segment of Silver Creek that is the subject of the District's Request to Inundate is not part of the reach of Morrison Creek on which the CWCB intends to appropriate an instream flow right ("Subject Reach"). Silver Creek is a tributary of Morrison Creek. The confluence of Silver

Creek and Morrison Creek bisects the Subject Reach. The CWCB already holds an instream flow right on Silver Creek, decreed in Case No. 77CW1328. That right is senior to the District's Morrison Creek Reservoir storage right, decreed in Case No. 07CW61. The relationship between the District's storage right and the existing Silver Creek instream flow right is not relevant to a determination by the CWCB whether to appropriate a new minimum instream flow on Morrison Creek. Therefore, the District's Request to Inundate may not be raised or considered at the hearing.

2. In addition to being irrelevant to the issues that may be raised at the ISF hearing, the District's Request to Inundate is premature.

- A. The District's Request to Inundate is inconsistent with the Stipulation and Decree entered in Case No. 07CW61 which mandates that the District shall submit inundation requests for the Morrison Creek Reservoir during the permitting process.*

The stipulation between the District and the CWCB entered in Case No. 07CW61 and the resulting decree in that Case, include a condition which states: "During the permitting process and prior to commencing construction of the Morrison Creek Reservoir that would inundate any existing CWCB instream flow right on Silver Creek decreed in Case No. 77CW1328, the District shall request and obtain approval from the CWCB for such storage pursuant to the provisions of 2 CCR 408-2, Section 7 . . ." Proponents' Prehearing Statement, Exhibits I and L. To the Proponents' knowledge, the District has yet to submit any permit applications for the proposed Morrison Creek Reservoir. Therefore, the Request to Inundate submitted by the District is premature.

By way of the Stipulation and resulting Decree, the CWCB and the District agreed that the permitting process was the appropriate time for the District to submit inundation requests. The timing of the District's requests is material because it affects the specificity of information available to District and the CWCB, including any terms and conditions imposed by other permitting agencies, proposed operating criteria, and the timing of construction. Inclusion of this term in the Stipulation and Decree illustrates the importance to the CWCB of obtaining information from the District regarding other permitting terms and conditions prior to addressing a request to inundate. Furthermore, it is not clear at this stage whether the District will successfully obtain all necessary permits to construct the Reservoir.

- B. The District's Request to Inundate is premature at this pre-permitting stage of the project and the CWCB may defer consideration of the request until the completion of permitting by other agencies.*

The ISF Program Rules explicitly allow the CWCB to defer decisions regarding requests to inundate until the applicant has obtained all other necessary permits. The Rules state, "[w]hen it appears that other governmental agencies may impose terms and conditions upon the issuance of a permit to construct a facility which will cause an inundation, the Board may defer consideration of the request to inundate until all other governmental bodies have finalized the permit or approval conditions." Rule 7j. The District admits in its Prehearing Statement that it

“will be required to obtain a number of permits in order to develop these conditional water rights,” which permits “will likely include terms and conditions necessary to protect minimum stream flows.” District’s Prehearing Statement, pp. 2-3. Given the likelihood that other agencies such as the Army Corps of Engineers will impose terms and conditions on construction and operation of the Reservoir, the CWCB should defer consideration of the District’s request until those permits have been issued. At that time, the CWCB, the public, and other commenting agencies would have the relevant information to recommend whether to grant the request, deny the request, or grant with additional conditions.

3. For the CWCB to consider the District’s alternative proposal at the hearing would violate the public review process and other procedural requirements necessary to any inundation request.

The CWCB may not respond to an inundation request unless and until the request is subject to public review and meets other mandatory procedural requirements. The District appears to make two inundation requests by way of its prehearing statement: (1) a formal written Request to Inundate, applicable to Silver Creek, and (2) a request not to be required to submit an additional request to inundate prior to constructing the Morrison Creek Reservoir, should the CWCB appropriate an instream flow right on the Subject Reach. Neither request satisfies the required procedural criteria.

The ISF Program Rules state that “[t]he Board shall follow the public review process in Rules 11a.–c. prior to any Board decision on a request to inundate an ISF right.” Rule 7n. This public review process requires public notice of the requested inundation and consideration of public comment in oral or written form at a public meeting. The CWCB may also request recommendations from state or federal agencies, or other persons, as it deems appropriate. To do so would be appropriate in this case given the necessary participation of other agencies in the permitting of the Morrison Creek Reservoir. Contrary to the suggestion by the District, there is not sufficient time to conduct proper public review if the CWCB were to make a contemporaneous determination as to the Morrison Creek instream flow appropriation and the District’s Request to Inundate.

When the time is appropriate for the District to submit an inundation request for Morrison Creek Reservoir, the Proponents suggest that substantial opportunity for public review would be appropriate given the high level of interest by the public and other agencies. For example, the ISF Program Rules require a two meeting public review process for other actions by the CWCB affecting its instream flow rights, such as an “injury with mitigation” determination. The Proponents suggest that a similar two meeting process would be appropriate to address the District’s Request to Inundate. This would allow the public and other agencies sufficient opportunity to review and comment on the proposal. Likewise, the Proponents request that the CWCB obtain recommendations from the Department of Wildlife and other agencies prior to making any determination as to the District’s Request.

The Proponents are also concerned that if the CWCB were to attempt to determine whether to appropriate an instream flow in Morrison Creek and respond to the District’s Request to Inundate simultaneously, as the District seems to suggest, this would risk confusing and

improperly comingling the relevant statutory and regulatory criteria. In reviewing a request to inundate, the CWCB must consider all relevant factors, including but not limited to: (1) the extent of inundation proposed; (2) the impact of the proposed inundation on the natural environment existing prior to the inundation; (3) the degree to which the beds and banks adjacent to the ISF right subject to the inundation are publicly or privately owned; (4) the economic benefits arising from the inundation; (5) the benefits to recreation and downstream ISF segments arising from the inundation; (6) the degree to which the proposed inundation will allow development of Colorado's allotment of interstate waters as determined by compact or adjudication; and, (7) any mitigation or compensation offered to offset adverse impacts on the ISF right. Rule 7g. In contrast, the CWCB's determinations in a contested instream flow appropriation are limited to the three discrete statutory criteria listed above, in Section 1. § C.R.S. § 37-92-102(3)(c) (2009). There is no feasible means for a single meeting or hearing to allow consideration of all relevant factors to an inundation request, and simultaneously limit submitted evidence to that relevant to an instream flow appropriation.

Finally, the content of the District's Request to Inundate and request to be exempted from future requests to inundate any new instream flow right in Morrison Creek, are insufficient to allow appropriate review of the request by the public or the CWCB. The ISF Program Rules require that a request to inundate include, at a minimum: the location of the inundation, the size of the inundation, impact of the inundation on the natural environment, any unique or rare characteristics of the ISF water right to be inundated, any regulatory requirements or conditions imposed upon the applicant by federal, state and/or local governments, all terms and conditions included in applicant's water court decree, and any compensation or mitigation offered by the Person proposing the inundation. Rule 7e. Although the District's written Request to Inundate Silver Creek includes a section titled "Impact of Inundation on CWCB ISF and Natural Environment," this section addresses federal permitting requirements for the project and potential impacts to the CWCB's Yampa River instream flow rights. The District does not provide any information in its request as to the expected impact of the inundation on the natural environment in and along Silver Creek or Morrison Creek, including impacts to riparian habitat, fish and other wildlife populations, and plantlife. Such information is essential to public review of the request and a determination by the CWCB.

The District's proposal that it be excused from the necessity of any future request to inundate instream flow rights that the CWCB may appropriate in Morrison Creek is entirely devoid of the substantive requirements necessary of a request to inundate an instream flow. The District's request is also procedurally premature. Because an instream flow in Morrison Creek has yet to actually be appropriated by the CWCB, the District cannot ascertain the facts that must be included in an inundation request. Likewise, there is not sufficient information for the CWCB to consider all of the necessary relevant factors in making a determination whether to allow inundation. The CWCB does not have the authority to grant such a premature request, nor would it advance the purposes of the CWCB instream flow program to do so.

Based on these considerations, the Proponents request that the CWCB exclude testimony or evidence related to the District's alternative proposal and Request to Inundate from the Morrison Creek ISF hearing. The Proponents further request that the CWCB defer consideration of any request to inundate related to the proposed Morrison Creek Reservoir until such time as

other permitting agencies have completed their permitting processes and the District submits appropriate requests to the CWCB that include complete information.

Dated this 15th day of July, 2010

PETROS & WHITE, LLC

By: /s/ Nicole L. Johnson
Charles B. White, No. 9241
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ATTORNEYS FOR FLYING DIAMOND RESOURCES AND
JAMES A. LARSON

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the **PREHEARING STATEMENT** has been served via courier, e-mail, or U.S. Mail, postage prepaid, on this 15th day of July, 2010, addressed to the following:

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