

BEFORE THE COLORADO WATER CONSERVATION BOARD

STATE OF COLORADO

**IN THE MATTER OF PROPOSED INSTREAM FLOW APPROPRIATION IN WATER
DIVISION 4: SAN MIGUEL RIVER (confluence Calamity Draw to confluence Dolores
River)**

NOTICE OF PARTY STATUS RE: INSTREAM FLOW APPROPRIATION

The Southwestern Water Conservation District, through its undersigned attorneys, submits the following Notice of Party Status Re: Instream Flow Appropriation in accordance with Rule 51 of the Rules Concerning the Colorado Instream Flow and Natural Lake Level Program, 2CCR 408-2 (the "ISF Rules").

A. Identity of Contesting Party:

Southwestern Water Conservation District ("SWCD")
c/o Mr. Bruce Whitehead, Executive Director
841 East Second Avenue
Durango, CO 81301
(970) 247-1302
brucew@southwesternwater.org

Please direct all notices, pleadings, and correspondence to SWCD's counsel:

John B. Spear
Janice C. Sheftel
Adam T. Reeves
Maynes, Bradford, Shipps & Sheftel, LLP
835 E. 2nd Avenue, No. 123
Durango, CO 81301
(970) 247-1755
bspear@mbssllp.com; jsheftel@mbssllp.com; areeves@mbssllp.com

B. Identification of Contested ISF Appropriation:

SAN MIGUEL RIVER (confluence Calamity Draw to confluence Dolores River)
CWCB ID: 09/4/A-009

C. Contested Facts (to the extent currently known):

1. Findings required by C.R.S. 37-92-102(3)(c) and Rule 5(i) of the ISF Rules:

a. Whether there is a natural environment within the claimed reach of the San Miguel River that can be preserved to a reasonable degree with the Board's water right if granted.

b. Whether such natural environment within the claimed reach of the San Miguel River will be preserved to a reasonable degree by the water available for the appropriation to be made.

c. Whether such natural environment within the claimed reach of the San Miguel River can exist without material injury to water rights.

2. SWCD's statutory charge, pursuant to C.R.S. § 37-47-101:

The SWCD's statutory charge includes:

. . . the conservation of the water of the San Juan and Dolores rivers and their tributaries [including the San Miguel River] for storage, irrigation, mining, and manufacturing purposes and the construction of reservoirs, ditches, and works for the purpose of irrigation and reclamation of additional lands not yet irrigated, as well as to furnish a supplemental supply of water for lands now under irrigation, [for] . . . the growth and development of the entire district and the welfare of all its inhabitants and that, to promote the health and general welfare of the state of Colorado.

In addition, under the legislative declaration creating the SWCD, SWCD was determined to be the:

. . . appropriate agency for the conservation, use, and development of the water resources of the San Juan and Dolores rivers and their principal tributaries. . . to safeguard for Colorado, all waters to which the state of Colorado is equitably entitled.

Id.

The SWCD is concerned that the proposed CWCB ISF for the San Miguel River will preclude the SWCD from performing its various statutory charges as set forth below:

3. In formulating the ISF amount, CWCB applied an incorrect legal standard.

The "Staff Analysis and Recommendation" ("Analysis") for the proposed San Miguel ISF consistently emphasizes maximum habitat protection, rather than "reasonable" protection for the or "minimum flows" for the ISF as legally required. See Analysis at p. 5 under "Field Survey Data," first full paragraph, last sentence; page 7, "Biological Flow Recommendations" footnote under Table 1, and second and third full paragraphs; ISF Rules, Rule 5i(2); C.R.S. § 37-92-103(4) and § 37-60-102(3). See also *Aspen Wilderness Workshop, Inc. v. Colorado Water Conservation Bd.*, 901 P.2d 1251, 1257 (Colo. 1995).

. . . [C.R.S.] Section 37-92-102(3) . . . grants the . . . [CWCB] the right to determine and appropriate only the minimum amount of water necessary for the preservation of the environment. . . . [T]he Conservation Board has "exclusive authority" only to appropriate "such waters of natural streams and lakes as the board determines may be required for *minimum* stream flows to preserve the natural environment to a reasonable degree." § 37-92-102(3). Because the Board has the duty to appropriate *only* the minimum amount of water necessary to reasonably preserve the environment, its water rights, as determined by the water court, and its actual appropriation must comport with that duty. (Emphasis added.)

Accordingly, the proposed ISF amounts are too high to constitute "a reasonable degree" of protection for the natural environment in the San Miguel River.

4. The proposed ISF amounts are not adequately supported. In particular:

- No documentation is provided regarding how the reach selected for the application of PHABSIM modeling is "representative" with respect to river morphological characteristics such as channel dimensions, gradient, and sinuosity.
- The synthetic hydrology developed to evaluate water availability at the lower terminus of the ISF reach is not well supported.
- Maximizing the habitat for only the adult stage of bluehead and flannel mouth suckers rather than supporting other important life stages under PHABSIM is inappropriate.
- No documentation was provided to verify that the PHABSIM habitat suitability curves developed for the Yampa and Colorado Rivers are suitable for the smaller San Miguel River.

5. The proposed ISF for the San Miguel River conflicts with the CWCB's charge to "correlate the activities of mankind with some reasonable preservation of the natural environment."

The CWCB's statutory charge is set forth at C.R.S. § 37-92-102(3), as follows:

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 . . . to preserve the natural environment to a reasonable degree. . . .* (Emphasis added.)

The "activities of mankind", include the development sufficient water for the next 50 years for the growing populations of Montrose and San Miguel Counties for municipal and industrial, commercial and irrigation uses.¹ The proposed San Miguel River ISF could preclude such development by preventing the availability of water for those uses. The proposed ISF appropriation could deprive the people of the state of Colorado of the beneficial use of those waters available by law and interstate compact.

6. Protection of present uses and exchanges under C.R.S. 37-92-102(3)(b):

The CWCB needs to include in its proposed San Miguel ISF appropriation terms and conditions to insure that the ISF will be subject to the present uses or exchanges of water

¹ In balancing the activities of "mankind", the CWCB's duties also include assisting water districts and towns, such as Norwood, and helping develop water for the state's future needs.

CWCB's duties include:

. . . foster[ing] and encourage[ing] irrigation districts, public irrigation districts, water users' associations, conservancy districts, drainage districts, mutual reservoir companies, mutual irrigation companies, grazing districts, and any other agencies which are formed under the laws of the state of Colorado, or of the United States, for the conservation, development, and utilization of the waters of Colorado. (Emphasis added.)

C.R.S. § 37-60-106(1)(a)

. . . foster[ing] the conservation of the water of the state of Colorado by the promotion and implementation of sound measures to enhance water use efficiency in order to serve all the water needs of the state, to assure the availability of adequate supplies for future uses, and to assure that necessary water services are provided at a reasonable cost. (Emphasis added.)

C.R.S. § 37-60-106(1)(r)

. . . aiding in the protection and development of the waters of the state, for the benefit of the present and future inhabitants of the state. . . (Emphasis added.)

C.R.S. § 37-60-102

. . . devise[ing] and formulate[ing] methods, means, and plans for bringing about the greater utilization of the waters of the state. . .

C.R.S. § 37-60-106(1)(c)

. . . gather[ing] data and information looking toward the greater utilization of the waters of the state . . . (Emphasis added.)

C.R.S. § 37-60-106(1)(d)

being made by water users pursuant to appropriation or practices existing as of the date of such appropriations, whether or not previously confirmed by court order or decree.

7. Compliance with C.R.S. 37-92-102(4)(a):

The CWCB San Miguel ISF appropriation needs to include, without limitation, terms and conditions regarding the withdrawal of statements of opposition in current water court cases; entry of the stipulations for decrees or other forms of contractual agreements, including enforcement agreements, to preserve the natural environment to a reasonable degree in a manner consistent with its CWCB obligations under Colorado law.

8. SWCD Reservation of right to contest other factual and legal matters.

SWCD reserves the right to identify other contested factual and legal issues prior to or at a hearing in this matter.

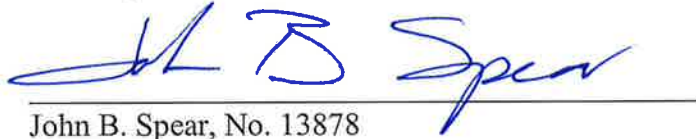
D. General Description of Data Upon Which SWCD will Rely (to the extent currently known):

1. The water rights applications filed by the Norwood Water Commission in Case Nos. 10CW202 and 203, Water Division No. 4, the applications filed by Montrose County in Case Nos. 10CW164, 10CW165, 10CW166, 10CW167, 10CW169, and 10CW194, and the application by Energy Fuels in Case No. 10CW176, and all statements of opposition of record in those cases.
2. All facts and data in the record of the Board to date, and in the files of the Colorado Division of Wildlife and U.S. Bureau of Land Management, regarding the proposed ISF.
3. All facts and data to be offered in rebuttal.
4. SWCD reserves the right to present other facts, data, documents and factual and opinion testimony at a hearing on this matter.

Wherefore, the Southwestern Water Conservation District files for party status to contest that proposed appropriation of the San Miguel River ISF and requests a hearing officer be appointed in accordance with Rule 5n of the ISF Rules.

Dated this 8th day of April 2011.

MAYNES, BRADFORD, SHIPPS & SHEFTEL, LLP
Attorneys for Southwestern Water Conservation District



John B. Spear, No. 13878

Janice C. Sheftel, No. 15346

Adam T. Reeves, No. 26230

Maynes, Bradford, Shipps & Sheftel, LLP

835 E. 2nd Avenue, No. 123

Durango, CO 81301

(970) 247-1755