

BEFORE THE COLORADO WATER CONSERVATION BOARD

IN THE MATTER OF PROPOSED INSTREAM FLOW APPROPRIATIONS
WATER DIVISION 4: SAN MIGUEL RIVER

REBUTTAL STATEMENT FOR FARMERS WATER DEVELOPMENT COMPANY

Farmer Water Development Company (hereinafter "FWDC"), through its attorneys FELT, MONSON & CULICHIA, LLC, by Chris D. Cummins, submits the following Rebuttal Statement:

I. Summary of Additional Factual and Legal Positions of the FWDC:

FWDC incorporates by reference all argument and citation contained in the previously submitted Pre-Hearing Statement, as though set forth in full herein. This Rebuttal Statement, and the previously submitted Pre-Hearing Statement of FWDC, may also be considered as "legal memoranda", as defined by Rule 5.1.2. of the CWCB Rules concerning the Colorado Instream Flow and Natural Lake Level Program, 2 CCR 408-2.

FWDC does not conceptually object to the appropriation by the CWCB of "*minimum* stream flows ... to preserve the natural environment to a reasonable degree" on the lower San Miguel River, the statutory limitation of the CWCB's in stream flow appropriation authority. See C.R.S. §37-92-102(3). The members of the FWDC, indeed, are primarily long-time residents of the lower San Miguel River valley, and long-time irrigators. Such experience provides them with a unique appreciation of both the natural environment in which they choose to reside and work, and the value of water, a scarce resource in this arid climate. It is these interests that the CWCB is charged by statute to maintain a balance between, and to do so while providing the greatest utilization of the waters of the State of Colorado. The CWCB is further charged with simultaneously enhancing water use efficiency to serve all the water needs of the state, and to assure adequate supplies for future uses. See C.R.S. §§37-60-106(1)(c), (d), and (q). However, the procedure utilized by CWCB staff, and cooperating agencies, in developing data for minimum in-stream flow ("MISF") recommendations, and the procedure utilized by the CWCB and the Water Court in appropriating and adjudicating the same, lack protections for the due process rights of other water users, and further allow the CWCB to ignore its statutory obligations. Such process is violative of the due process rights constitutionally guaranteed to citizens of the State of Colorado. This process further shifts the costs and the burden of proof of ensuring that only *minimum* in-stream flows are appropriated from the proponent, CWCB, and onto the public. This potentially results in over-appropriation of MISF beyond the minimum required to protect the natural environment to a reasonable degree (i.e. beyond the "beneficial use" for which the CWCB is authorized to appropriate MISF), resulting in a failure of the CWCB's statutorily prescribed duties to enhance water use efficiency and provide adequate supplies for future uses.

II. Argument.

A. CWCB Procedure.

To initiate an MISF appropriation, the CWCB staff prepares a recommendation for appropriation of a MISF based upon the recommendation of third parties, often, as here, sister agencies such as the Colorado Division of Wildlife ("CDOW") and United States Bureau of Land Management ("BLM"). See CWCB Rule 5.a. The CWCB staff then typically holds a series of public meetings in which members of the public at large, to the extent they are aware of such meetings, may provide comment in hopes that their concerns and interests will be balanced with any eventual MISF appropriation, while adequate supplies for their future uses of water are provided for. See CWCB Rule 5.c. Following such "public notice and comment procedure" CWCB staff prepares a recommendation for the CWCB Board. If approved by the CWCB, a "notice of intent to appropriate" is then provided to the public, utilizing the ISF Subscription Mailing Lists. Id. That, in addition to posting on the CWCB website, is the only notice provided of the proposed ISF. Following the notice to the ISF Subscription Mailing List, parties may seek to participate in the formal hearing process and provide comment for the record prior to the CWCB formally appropriating the MISF – the stage of the process in which we are currently engaged. Id.

Following the Board's formal appropriation of an MISF, the CWCB staff proceeds to file with the appropriate Water Court an application for said MISF, which when approved, will be incorporated in Colorado's prior appropriation system of water rights administration, as provided at C.R.S. §37-92-101, *et seq.* However, the CWCB's proceedings in Water Court differ from the strict proof standard to which all other water rights appropriations are judged. CWCB's decisions concerning the "minimum" quantity of water necessary for its MISF, whether such appropriation provides a beneficial use in "maintaining the natural environment to a reasonable degree", and whether there is indeed a natural environment to maintain, and even whether material injury will occur to the water rights of others, are all subject to a lesser "arbitrary and capricious" standard of review by the Water Court. See C.R.S. §37-92-102(4)(c), and C.R.S. §§24-4-106(6) and (7). Therefore, based on the inability to fully evaluate the CWCB's MISF appropriations at the Water Court level, constitutional procedural safeguards at the administrative hearing level are of the utmost import.

B. CWCB Rules.

The CWCB is a creature of statute, its organic statute being C.R.S. §37-60-101, *et seq.*, in which it is declared that the CWCB is "*an agency of the state, and the functions it is to perform... are declared to be governmental functions for the welfare and benefit of the state and its inhabitants.*" Id. As an agency of the State, the CWCB is subject to the provisions of the State Administrative Procedures Act ("APA"), as codified at C.R.S. §24-4-101 *et seq.* Therefore, any and all rules promulgated by the CWCB must be consistent with established provisions of law, including constitutional protections and all elements of the APA. See, C.R.S. 24-4-103(4)(b)(IV). The CWCB has promulgated rules in regards to Colorado Instream Flow and Natural Lake Level Program pursuant to statutory authority

for the same at C.R.S. §§37-92-102(3) and 37-92-108, promulgated at 2 CCR 408-2 ("CWCB Rules"). Among other things, the CWCB Rules provide that:

- "final action" means a board decision to file (or not to file, or to table) a MISF water right application with the Water Court (CWCB Rule 4.g.);
- that "proper notice" means not the constitutional due process concept of notice¹, but rather *"the customary public notice procedure that is provided each year by the Board... which may include posting of the agenda at the Board office, filing legal notices when required, mailing Persons on the Board mailing lists and posting notices on the Board's website"* (CWCB Rule 4.n.);
- that findings concerning the natural environment, protection of the same with the water available, and the lack of material injury shall be reviewed by the Water Court subject to the "arbitrary and capricious" standard, discussed at C.R.S. §§24-4-106(6) and (7) (see CWCB Rule 5.i.);
- that the hearing held by the CWCB in a contested MISF proceeding is not a formal agency adjudication as discussed in the APA at C.R.S. §24-4-105, but rather a "notice and comment hearing", despite the final agency action that typically follows such a hearing (CWCB Rule 5.j.1.);
- that parties in contested MISF proceedings may discuss only the topics of Rule 5.i., and may not, therefore, present evidence of other relevant objections, including whether the proposed MISF is consistent with all of the statutorily prescribed duties of the CWCB (CWCB Rule 5.j.3);
- that issues such as time available to parties during the hearing or anticipated procedural objections will be addressed during a pre-hearing conference, presided over by a Hearing Officer (CWCB Rule 5.n.4.);
- that the Board may limit the number of witnesses allowed to testify at the contested hearing (CWCB Rule 5.p.1.); and,
- that only the Board may question witnesses at the contested hearing, except in the Board's discretion (CWCB Rule 5.p.3).

¹ The Colorado Constitution provides that *"No person shall be deprived of life, liberty or property without due process of law"*. Const. Art. II, Sec. 25. The minimum elements of due process are notice and an opportunity to be heard before a competent tribunal. State Bd of Med. Examiners v. Palmer, 400 P.2d 914, 916 (1965). Fundamental fairness, the test as to whether due process requirements are met, embodies advance notice and an opportunity to be heard. Mountain States Tel. & Tel. Co. v. Dept. Of Labor & Employment, 520 P.2d 586, 589-590 (Colo. 1974).

In the present proceedings, the Hearing Officer advised the parties of these rules during the pre-hearing conference. The parties were advised that time for the hearing would be limited to only 5 hours total, that of that 5 hours contesting parties could share only 2 hours for combined testimony, and that no questions or cross-examination of witnesses, except by the CWCB Board, would be permitted. The parties were advised that motions could be filed requesting relief from such limitations, but that argument on such procedural motions would further reduce such parties allocated time for substantive argument at the hearing. FWDC believes that the CWCB Rules, in concert with statutory provisions prohibiting a full and fair hearing at the Water Court level, and the application of those rules and statutes by the Staff, fail to provide the procedural safeguards necessary to protect the public's constitutional rights to meaningfully participate in these proceedings. Due process is not to be granted or denied at the discretion of administrative bodies.

C. Lower San Miguel River MISF Proceedings.

FWDC believes that the application of the CWCB Rules to the instant MISF proceedings results in a denial of constitutionally guaranteed due process rights. As a result, FWDC and other parties to these proceedings are left impaired in their ability to challenge: (1) the necessity of the MISF requested on the lower San Miguel River; (2) whether the MISF appropriate is the minimum amount necessary to protect the environment to a reasonable degree; (3) whether the MISF injures other water rights; (4) whether the public's constitutional right to appropriate the unappropriated waters of the State are impaired by the MISF; and (5) whether the CWCB has fully complied with all of its statutory obligations.

FWDC further believes that the actual minimum flows necessary for the protection of the natural environment to a reasonable degree are evidenced by actual historical stream conditions. In other words, there would be no natural environment if existing flows were insufficient. CWCB staff's request for appropriations in excess of the minimum necessary to maintain the natural environment to a reasonable degree results in a shifting of costs, and effectively the burden of proof, from the proponent of the MISF, CWCB, to those who would be adversely affected by over-appropriation of instream flows, the public. The public's ability to change existing senior water rights "to other uses and locations is a very important feature of Colorado water law", but would be compromised by such over-appropriation, therefore requiring zealous opposition to the CWCB staff's recommendation. See Southeastern Colorado Water Conservancy District v. High Plains A&M, LLC, 120 P.3d 710, 721-722 (Colo. 2005). Overappropriation of an MISF by the CWCB also impairs the public's right to appropriate the unappropriated waters of the State of Colorado, as guaranteed by the Colorado Constitution, by locking up the stream for a non-beneficial use (i.e., an MISF that exceeds the minimum amount necessary to protect the environment to a reasonable degree).

1. CWCB MISF Proceedings are quasi-judicial.

The CWCB Rules, despite acknowledging that the Board's final action in regards to MISF requests will be subject to "judicial review" (CWCB Rule 5.i.), and despite

acknowledging that parties to contested hearings may "present evidence, witnesses and argument" and submit "legal memoranda", nonetheless state that "the hearing shall be a notice and comment hearing as authorized in C.R.S. §37-92-102(4)(a), and shall not be a formal agency adjudication under C.R.S. §24-4-105". See CWCB Rule 5.j.1. Section 24-4-105 provides the procedural safeguards for quasi-judicial agency proceedings for the express purpose of ensuring "that all parties to any agency adjudicatory proceeding are accorded due process of law". *Id.* No such protections are contained in C.R.S. §37-92-102(4)(a), in large part because that statute does not contemplate an adjudicative format or hearing. Rather, this section concerns CWCB Board determinations based only on "public notice and comment procedure". While such procedure might be appropriate in non-contested MISF appropriations, such procedure cannot be reasonably interpreted to apply to clearly quasi-judicial proceedings where evidence, witnesses, and legal memoranda are specifically provided for, and where specific appellate review limitations are in place. In such instance, constitutional due process safeguards are absolutely essential. Regardless of how the CWCB elects to attempt to characterize the nature of its contested MISF hearing, the nature of the proceeding itself makes clear its quasi-judicial nature:

Quasi-judicial action is characterized by the following factors: (1) a local or state law requiring that notice be given before the action is taken; (2) a local or state law requiring a hearing before the action is taken; and (3) a local or state law directing that the action results from the application of prescribed criteria to the individual facts of the case. Such criteria may include broadly stated provisions of an agency's enabling act, regulations promulgated thereunder, or both.

Gilpin County Board of Equalization v. Russell, 941 P.2d 257, 262 (Colo. 1997). Notwithstanding prior erroneous lower court opinions, because the contested MISF hearing process is clearly quasi-judicial in nature, concerning specific appropriations of water rights on a specific river, and affecting specific water rights users and the rights of the public to the appropriation of the waters of a specific river, due process safeguards must be included to ensure that all interested parties are provided with constitutionally guaranteed notice and an opportunity to be heard, and associated due process guarantees.

2. Notice and opportunity to be heard.

One of the foundational rights of the jurisprudence system of the United States is that of fundamental fairness associated with due process of law. See Colorado Constitution, Art. II, Section 25. The requirements of due process of law under both the United States and Colorado Constitutions take precedence over statutory enactments of the general assembly. White v. Davis, 428 P.2d 909, 910-911 (Colo. 1967). Procedural due process requires that in addition to a fair and open hearing, there must be due notice and an opportunity to be heard, and the procedure must be consistent with the essentials of a fair trial. Public Utilities Commission v. Colo. Motorway, Inc., 437 P.2d 44, 47 (Colo. 1968).

a. Notice. In order for a valid judgment to be entered in a proceeding *in rem* or *quasi in rem*, every person who has an interest in the *res* must have legal notice of the proceeding and an opportunity to be heard. Due process requires notice, by actual or substituted service of process. Weber v. Williams, 324 P.2d 365, 367-369 (Colo. 1958). Whenever an action may deprive a person of property, or create a charge against it, the owner must have notice of the proceeding and be afforded an opportunity to be heard as to the correctness of the charge – It matters not what the character of the proceeding may be, whether administrative, judicial, summary or otherwise. Brown v. City of Denver, 3 P. 455, 459 (1884). In this instance, the property right deprived by an excessive MISF is the impairment of the public's right to appropriate the unappropriated water of the State of Colorado, guaranteed by the Colorado Constitution.

To appropriate an MISF, the CWCB Rules provide only for notice to be served upon parties who have affirmatively elected to be placed on the "ISF Subscription Mailing Lists", and for limited website posting. As such, the scope of the CWCB's notice provisions is essentially limited to those parties who already requested such notice, not the general public or water rights holders. This is in contrast to the judicial notice provisions for notice of water rights applications, requiring publication not only in the "water resume" circulated amongst interested parties (similar to the ISF Subscription Mailing Lists), but also publication in a newspaper of general circulation in the county in which a water rights appropriation is to be made. See C.R.S. §37-92-302(3); see also Pueblo West Metropolitan Dist. V. Southeastern Colorado Water Conservancy Dist., 689 P.2d 594, 601 (Colo. 1984). This water court procedure, as adopted in the 1969 Water Rights Act, is consistent with the rationale authorizing the use of service by publication in general, whereby known parties are provided specific notice (i.e. ISF Subscription Mailing Lists) while publication allows alternate service upon unknown parties who may have an interest. See Rael v. Taylor, 876 P.2d 1210, 1225 (Colo. 1994), citing Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). While the CWCB may argue that MISF appropriations eventually are published in such manner when application is eventually made to the Water Court, such notice comes too late for anything but a deferential review of the Board's findings by the Water Court, thereby depriving such late-notified parties of constitutionally protected due process of law.

b. Opportunity to be Heard. The fundamental fairness derived from a fair and impartial hearing secures an individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice. See People v. Max, 198 P. 150 (Colo. 1921). Quasi-judicial actions require notice and an opportunity to be heard. Shoenberg Farms, Inc. V. People ex rel. Swisher, 444 P.2d 277, 282 (Colo. 1968). If an administrative adjudication turns on questions of fact, due process requires that the parties be apprised of all the evidence to be submitted and considered, and that they be afforded a reasonable opportunity in which to confront adverse witnesses and to present evidence and argument in support of their position. Hendricks v. Indus. Claim Appeals Office, 809 P.2d 1076, 1077-1078 (Colo.App. 1990). In contrast to due process requirements, in the instant matter, the five parties contesting the CWCB staff recommendation have been limited to 2 hours for presentation

of their combined cases, without the opportunity to either direct or cross-examine witnesses, including their own. Undoubtedly a trial of several days would be necessary for a full and fair examination of the evidence in such a complex science-based matter, were this matter in a judicial setting before the Water Court. Due process requires nothing less here, and the potential for the CWCB to, at its discretion, allow for limited cross examination at the time of the hearing does not remedy these due process shortfalls. The opportunity to be heard must be granted at a meaningful time and in a meaningful manner. In re Marriage of Goellner, 770 P.2d 1387, 1388 (Colo. App. 1989), *citing* Armstrong v. Manzo, 380 U.S. 545 (1965). A court's interest in administrative efficiency may not be given precedence over a party's right to due process, which includes the right to cross-examine to meet opposing evidence and to oppose with evidence. Id. At 1389, *citing* Estate of Buchman, 267 P.2d 73 (1954).

While these objections were raised by undersigned counsel and attorneys representing other contesting parties during the pre-hearing conference held in this matter, contesting parties were advised that: (1) this was the only time allowed before the Board; (2) the Board had determined that direct and cross examination of witnesses was not beneficial to their analysis; and (3) if the contesting parties wished to expand the hearing time, request direct and cross examination, or otherwise deviate from the strict format provided by the CWCB Rules, such parties could file a motion for the same – with the caveat that argument on such motions before the CWCB would come out of the already limited 2-hour combined presentation time, further limiting the contesting parties' ability to present their substantive arguments. For this reason, FWDC has elected to frame its arguments concerning due process shortfalls in this Rebuttal Statement, rather than further limit the time available for substantive argument from other contesting parties at the hearing. FWDC does not request oral argument on these issues, but rather wishes to document such objections for the record.

II. List of Exhibits to be Introduced at Hearing:

FWDC has no additional exhibits, aside from those provided with FWDC's Pre-Hearing Statement, that FWDC wishes to be included in the official record of the hearing process.

III. List of Witnesses to be Called and a Description of Their Testimony:

While FWDC reserves the right to call all witnesses identified in FWDC's previously submitted Pre-Hearing Statement, FWDC has no additional witnesses to identify in this Rebuttal Statement.

IV. Alternative Proposal to Proposed Minimum Instream Flow:

FWDC repeats its assertion that procedural defects deny FWDC and other parties to these proceedings with adequate opportunity to present their concerns, complaints, and alternative evidence, and further repeats its assertion that the CWCB staff has failed to meet its burden to evidence and substantiate whether or not an MISF is necessary and

whether the amount claimed is the minimum amount necessary. As such, FWDC does not believe CWCB staff can meet its burden with reliable evidence, nor that opposing parties have been provided a fair opportunity to challenge the assertions of the CWCB staff, FWDC does not at this time recommend any alternative to the proposed MISF, nor terms and conditions.

V. Written Testimony to be Offered into Evidence at hearing:

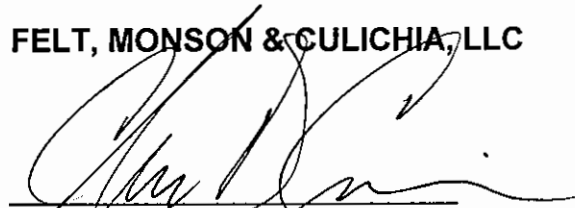
None known at this time, but FWDC reserves the right to submit written testimony to the extent that individuals who might provide valuable testimony are unable to attend the hearing, and may provide such written testimony on or before August 26, 2011, as discussed and confirmed during the pre-hearing conference in this matter with the Hearing Officer.

VI. Legal Memoranda:

FWDC does not anticipate submission of further legal memoranda, but asks that the contents of this Rebuttal Statement, FWDC's Pre-Hearing Statement, and the Rebuttal Statements and Pre-Hearing Statements of all other parties and CWCB staff be included in the formal record of these proceedings.

RESPECTFULLY SUBMITTED this 18th day of August, 2011

FELT, MONSON & CULICHIA, LLC



Chris D. Cummins, #35154
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the enclosed documents were served via FedEx (Priority Overnight Delivery), via U.S. Mail, postage prepaid, or via e-mail (as indicated) on the following person(s) this 18th day of August, 2011:

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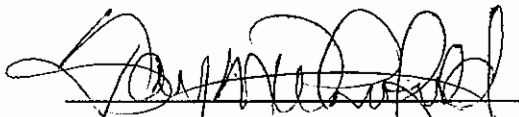
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