

BEFORE THE COLORADO WATER CONSERVATION BOARD

STATE OF COLORADO

Prehearing Rebuttal Statement of Sheep Mountain Alliance

IN THE MATTER OF STAFF'S RECOMMENDATIONS FOR AN INSTREAM
FLOW APPROPRIATION ON THE SAN MIGUEL RIVER BELOW CALAMITY
DRAW, WATER DIVISION 4

Pursuant to Rule 5n of the Rules Concerning the Colorado Instream Flow and Natural Lake Level Program ("ISF Rules") and the First Prehearing Order dated August 2, 2011, Sheep Mountain Alliance ("SMA") hereby submits its prehearing rebuttal statement in support of the CWCB staff recommendation and to rebut several factual and legal claims by the parties opposing the proposed instream flow (the "Opposers").

I. FACTUAL AND LEGAL CLAIMS

Opposers make the following erroneous legal and factual claims:

1. The flow recommendations by CWCB staff and the Bureau of Land Management and Colorado Department of Wildlife (the "Recommendation") are based upon an incorrect legal standard resulting in excessive flow recommendations.
2. The proposed instream flow recommendation ("ISF") will injure water rights or will deprive Opposers or others of the beneficial use of waters available by law and interstate compact.
3. The proposed ISF fails to balance the needs of the environment with human needs.

These claims are addressed below.

A. Opposers Incorrectly Claim that the Proposed ISF Amounts are Based Upon an Incorrect Legal Standard.

Through selective quotation of the Recommendation¹, Opposers attempt to mislead the Board by arguing that the proposed ISF appropriation exceeds the Board's statutory authority to appropriate instream flows to preserve the natural environment to a reasonable degree. Opposers inappropriately conflate the biological goal of maximizing

¹ More specifically referencing the Letter from Helen M. Hankins, State Director, Bureau of Land Management (December 15, 2010) included in the Recommendation.

habitat for threatened fish species with the legal standard of appropriating the minimum flow necessary to preserve the environment to a reasonable degree. Opposers cite no legal basis for their claim that flows necessary for maximizing habitat for threatened species exceed the legal standard.

The term “natural environment” is not defined in the instream flow statute², nor does the statute specify what is meant by requiring “such minimum flows as are necessary preserve the environment to a reasonable degree.”³ According to the Colorado Supreme Court, the actual determinations regarding which areas of a river are most amenable to preservation and what life forms are presently flourishing *or capable of flourishing*, are made by agency staff (in this case, the CWCB, CDOW, and BLM staff) utilizing their expertise.⁴

Moreover, a complete reading of the Recommendation illustrates that the recommended flow levels fall within the Board's statutory authority. The flow recommendations are intended to preserve “90% of the weighted useable area available to the bluehead sucker and 100% of the weighted useable area available to the flannelmouth sucker” during higher flow periods, and to maximize what habitat is available to the species “under a declining hydrograph” during the drier times of the year. The Colorado Supreme Court has held that appropriating minimum stream flows to protect existing aquatic habitat and related fish production complies with the legal standard of protecting the natural environment to a reasonable degree.⁵

Finally, Opposers also argue that because the subject fisheries survived a temporary drought period of flows lower than recommended by CWCB staff, the proposed ISF exceeds the statutory requirement. This argument fails to consider the effect of extended or permanent flows below the proposed ISF amounts on the fisheries, and Opposers have provided no evidence whatsoever that the threatened species can survive extended flows lower than proposed for the ISF.

B. Opposers Provide No Evidence that the Proposed ISF Will Injure Existing Water Rights or Deprive Opposers or Others of the Beneficial Use of Water Available By Law or Interstate Compact.

In considering whether to approve the proposed ISF, the CWCB Board must consider whether the natural environment can exist without material injury to water rights. The Opposers have failed to make any claim that the proposed ISF, and the natural environment it is intended to protect, will injure *existing* water rights. Instead, their claims of injury are based entirely on uses of water that they may, or may not, need at some undefined time in the future.

² C.R.S. § 37-92-102(c).

³ *Colo. River Water Conservation Dist. v. Colo. Water Conservation Board*, 594 P.2d 570, 576 (Colo. 1979).

⁴ *See Id.*

⁵ *Id.* at 577.

The Opposers' claims of injury are particularly specious given that Montrose County, the Norwood Water Commission ("NWC") and Lone Cone Ditch and Reservoir Company ("Lone Cone")⁶ all have filed applications for water rights adequate for at least their next 50 years' anticipated growth. Similarly, Farmers Water Development Company opposes the proposed ISF because it may impact future, undefined changes it may wish to make to its existing water rights. The opposition of the Southwestern Water Conservation District is based on nothing other than their reflexive opposition to *all* instream flow filings; in this case, their opposition is in defiance of the unanimous support of the proposed ISF by the San Miguel County Commissioners, the governing body of one of their member counties.⁷

Opposers also fail to substantiate in any way their claim that the proposed ISF deprives water users of the beneficial use of water available by law or interstate compact. Instead, they can claim only that "there is a potential" that the proposed ISF "could deprive" water users of the beneficial use of water. Their claim is merely speculative. Since *Opposers* have the burden of proving that the proposed ISF *in fact* deprives water users of the beneficial use of water, this claim must be rejected.

C. Opposers Incorrectly Claim that the CWCB Board Must Balance Protection of the Environment with Human Needs.

A number of the Opposers claim that the Board must balance protection of the natural environment with human needs, "including future needs". This argument demonstrates a fundamental misunderstanding of the purpose of the instream flow program and ignores the reality that humans can and do appropriate water at anytime for their needs, including their future needs. Opposers cite no statutory or common law basis for their assertion, and it must be rejected.

The CWCB Board must make three findings before initiating an instream flow filing: 1) that there is a natural environment that can be preserved to a reasonable degree with the Board's water right if granted; 2) that 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.

The Recommendation, as well as additional information provided in the prehearing statements of CWCB staff, CDOW and the BLM, strongly supports these findings with respect to the proposed ISF. Opposers' attempt to inject additional issues into the Board's determination should be rejected.

⁶ NWC and Lone Cone also demand that the Board tie the ISF to approval of their water rights application. There is no legal basis for this demand.

⁷ San Miguel County is the second largest contributor of tax revenues to the Southwestern Water Conservation District. The District's opposition is particularly self-defeating given that San Miguel County's economic health is directly related to healthy instream flows in the San Miguel River.

II. EXHIBITS AND WITNESSES

SMA does not have additional exhibits or witnesses to add to those described in its prehearing statement.

III. ALLOCATION OF TIME AT HEARING

SMA has been allocated ten minutes to present its case at the hearing. If SMA does not use its entire allocated time, SMA wishes to add its remaining time to the time available to CWCB staff for any portion of its case, including rebuttal.

Respectfully submitted this 18th day of August, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that I have duly served the copies of the foregoing PREHEARING REBUTTAL STATEMENT upon all parties herein by Federal Express, email or depositing copies of the same in the U.S. mail, postage prepaid this 18th day of August, 2011 addressed as follows:

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