

# **BEFORE THE COLORADO WATER CONSERVATION BOARD**

## **STATE OF COLORADO**

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### **IN THE MATTER OF PROPOSED INSTREAM FLOW APPROPRIATION IN WATER DIVISION 4: SAN MIGUEL RIVER (confluence Calamity Draw to confluence Dolores River CWCB ID: 09/4/A-009)**

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#### **REBUTTAL PREHEARING STATEMENT OF SOUTHWESTERN WATER CONSERVATION DISTRICT**

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In accordance with Rule 5n of the Rules Concerning the Colorado Instream Flow and Natural Lake Level Program, 2CCR 408-2 (the "ISF Rules") and the First Prehearing Order issued in this matter, Southwestern Water Conservation District ("SWCD") hereby submits its Rebuttal Prehearing Statement in opposition to the CWCB staff recommendation to appropriate an instream flow on the San Miguel River between its confluences with Calamity Draw and the Dolores River.

#### **I. INTRODUCTION.**

As the SWCD has previously asserted, the Colorado Water Conservation Board's core statutory charge when making an instream flow appropriation is to "correlate", i.e. balance, the needs of man with some reasonable protection of the natural environment.<sup>1</sup> As more fully detailed below the Prehearing Statements of CWCB staff, DOW, and BLM along with those of other proponents have not provided the Board adequate information to carry out that charge. Accordingly, as requested previously, SWCD renews its request that this matter be remanded to Staff for further analysis.

#### **II. LEGAL ARGUMENT.**

In carrying out its core charge to correlate the needs of mankind with some reasonable protection of the natural environment, the Board must consider evidence on two key issues: 1) evidence that the amount claimed for any ISF is the minimum amount necessary to preserve the natural environment to some reasonable decree taking into consideration other needs and 2) evidence that the appropriation can operate without impairing Colorado's ability to develop water available by law and compact. With respect to both of these issues the evidence and analysis proffered by Staff has been inadequate to afford the Board the opportunity to make a reasoned analysis and determination on the proposed ISF.

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<sup>1</sup> See Prehearing Statement of Southwestern Water Conservation District ("SWCD PHS") at 2.

***A. Staff Has Not Provided Evidence Necessary for the Board to Balance Human and Environmental Needs.***

With respect to the Board's "correlation" obligation, Staff has taken the position that deferring the instream flow appropriation and thereby affording affected communities the opportunity to engage in accelerated water supply planning for their next half century of growth is adequate balancing of human and environmental needs. *See* Prehearing Statement of Staff of the Colorado Water Conservation Board ("Staff PHS") at B(4).

This is "water court . . . or else" position is a curious view of CWCB's charge to strike a balance between human and environmental needs. The ISF program was never intended to be used as a sword against local communities, but rather as a shield to insure that some reasonable provision be made for environmental needs rather than allowing every last drop to be appropriated for consumptive uses. The better approach would have been for staff to collaboratively ascertain future needs and limit the proposed appropriation in a manner that would allow such future development, rather than leaving local, affected communities to the vicissitudes of an uncertain rush to water court.

***B. Staff has not proposed the minimum streamflow necessary to preserve the natural environment.***

As a practical matter, there can be little doubt that a proposed appropriation that invites and encourages affected parties to seek priorities senior to the proposed ISF, proposes to appropriate more than the minimum necessary to preserve the natural environment. Consistently, Staff and proponents have sought to maximize or optimize native fish habitat.<sup>2</sup> There has been no effort on the part of staff to identify whether these amounts are consistent with and can accommodate human needs.

***C. Staff Has Not Established that the Proposed ISF Appropriation Will Not Impair the Ability to Develop Compact Entitlements.***

With respect to the required finding that the ISF will not impair the ability to develop legally available water, Proponents, including staff have glibly argued that the mere fact that a volume of water in excess of the ISF may be available for appropriation in excess of the ISF is an adequate showing.<sup>3</sup> This irresponsibly dismisses the realities of water development by simply ignoring the timing and location of water available for appropriation. As members of the Board are aware the simple availability of water for appropriation at certain times of the year may not be the largest hurdle in developing reliable water supplies for municipal, industrial and

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<sup>2</sup> Staff and Proponents have sought to maximize Flannemouth Sucker and Bluehead Sucker habitat. *See, e.g.* SWCD PHS at 3; Exhibit 2 of Western Resource Advocates and Wilderness Society Prehearing Statement at 10 ("500 cfs . . . is the flow needed to maximize habitat for bluehead suckers").

<sup>3</sup> *See, e.g.* Staff PHS at B(4) ("as significant volume of water will remain available for new junior water rights and future water development").

agricultural needs. The limits on points of diversion which require access to federal lands, the need to construct expensive storage or pumping projects and the availability of reservoir sites should all be taken into account when determining the real impact on the ability to conduct future water development.

### **III. FACTUAL CLAIMS, EXHIBITS AND WITNESSES.**

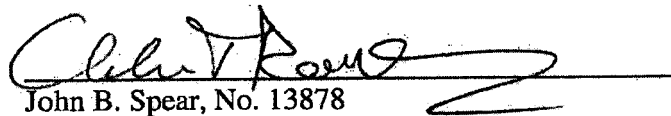
SWCD's factual claims, exhibits and witnesses have been previously set forth in its prehearing statement.

### **IV. ALTERNATIVE PROPOSAL TO THE PROPOSED INSTREAM FLOW.**

SWCD renews and restates its request that the Board remand this matter to staff for further consideration, or, alternatively reduce the proposed appropriation as described in its prehearing statement.

Dated this 19th day of August 2011.

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A handwritten signature in black ink, appearing to read "John B. Spear", is written over a horizontal line.

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the enclosed documents were served as indicated on the following person(s) this 19<sup>th</sup> day of august, 2011:

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