

BEFORE THE COLORADO WATER CONSERVATION BOARD

STATE OF COLORADO

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

MOTION TO CONDUCT LIMITED CROSS-EXAMINATION AT HEARING

The Board of County Commissioners of Montrose County ("Montrose County"), by and through its undersigned attorneys, hereby submits this motion to allow the parties to conduct limited cross-examination of witnesses at the September 13, 2011 hearing scheduled for the proposed San Miguel River instream flow appropriation. As grounds therefor, Montrose County states as follows:

1. At the hearing set before the Colorado Water Conservation Board ("Board") on September 13, 2011, the Board is required to make three specific determinations as a pre-requisite to initiating a water rights filing for the proposed San Miguel River instream flow appropriation ("San Miguel ISF"). See § 37-92-102(3)(c), C.R.S.
2. These determinations will define the amount and scope of the proposed ISF water right application to be filed with the Water Court. Accordingly, any such determinations made by the Board constitute a quasi-judicial action. *Colorado Ground Water Comm'n v. Eagle Peak Farms*, 919 P.2d 212, 217 (Colo. 1996) (Quasi-judicial actions determine specific rights based on application of legal standards to the "facts developed at a hearing conducted for the purpose of resolving the particular interests in question.").
3. C.R.S. § 24-4-105(7), part of the State Administrative Procedure Act ("APA"), sets forth the general rules for adjudicatory hearings by State agencies, stating that (emphasis added): "every party to [a] proceeding shall have the right to present his case or defense by oral and documentary evidence . . . and to conduct such cross-examination as may be required for a full and true disclosure of the facts."
4. Rule 5p(3) of the Rules Concerning the Colorado Instream Flow and Natural Lake Level Program, 2 CCR 408-2, states that the Board may allow parties to question witnesses where it will (a) "materially aid the Board in reaching its decision," or (b) relates to the statutory findings required by § 37-92-102(3)(c), C.R.S.
5. In the case of the proposed San Miguel ISF, the prehearing statements filed by the parties indicate that the issues to be determined by the Board pursuant to § 37-92-102(3)(c), C.R.S., are in dispute. At least five expert reports were submitted by the parties with their prehearing statements, not including the additional reports submitted by Staff, DOW and BLM. Cumulatively, these reports identify that there

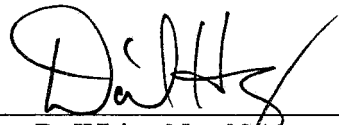
are significant differences of fact and opinion concerning complex issues such as habitat modeling and water availability analyses.

6. Granting the parties an opportunity to conduct cross-examination of these witnesses, within reasonable time limits, at the hearing will both materially aid the Board in making its determinations on these complex issues, and is related directly to the statutory findings required of the Board.
7. Moreover, allowance of limited cross-examination will ensure the creation of a full and complete record of proceedings. If the Water Court's review of any determinations made by the Board pursuant to § 37-92-102(3)(c), C.R.S., is to be limited to the "record review" standards under the APA, pursuant to § 37-92-102(4)(c), C.R.S., limited cross-examination is critical to ensure that the administrative record is complete and allows all parties to fully exhaust their remedies.

WHEREFORE, Montrose County respectfully requests that the Board grant the parties the right to conduct limited cross-examination of witnesses at the September 13, 2011 hearing on the proposed San Miguel ISF.

Dated this 15th day of July, 2011

PETROS & WHITE, LLC

By: 
Charles B. White, No. 9241
David S. Hayes, No. 28661

ATTORNEYS FOR THE BOARD OF COUNTY
COMMISSIONERS OF MONTROSE COUNTY

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of August, 2011, I have duly served 22 copies of the foregoing **MOTION TO CONDUCT LIMITED CROSS-EXAMINATION AT HEARING** via hand-delivery, addressed as follows:

Colorado Water Conservation Board
1313 Sherman Street, Room 721
Denver, CO 80203

In addition, I hereby certify that I have duly served the foregoing **MOTION TO CONDUCT LIMITED CROSS-EXAMINATION AT HEARING** upon the following parties herein by e-mail or by depositing copies of the same in the United States mail, postage prepaid, addressed as follows:

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