

BEFORE THE COLORADO WATER CONSERVATION BOARD

STATE OF COLORADO

Response to Motion to Conduct Limited Cross-Examination at Hearing

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

On August 8, 2011, Objector, Board of County Commissioners of Montrose County ("Montrose County") submitted a Motion to Conduct Limited Cross Examination at Hearing (the "Motion"). The Staff of the Colorado Water Conservation Board ("Staff") hereby submits its Response to the Motion.

1. Montrose County argues that the hearing set before the Colorado Water Conservation Board (the "Board") on September 13, 2011, is a quasi-judicial action and requests the right to conduct limited cross-examination of witnesses at the hearing.

2. Contrary to Montrose County's argument, the hearing is not a quasi-judicial action; but rather it is a quasi-legislative proceeding. The Water Court for Water Division 2 has held the Board's appropriation of an instream flow water right is a quasi-legislative proceeding. Order, Case Nos. 98CW148, 98CW149, 98CW150, 98CW160, District Court, Water Division 2, Sept. 19, 2002, at p.6 (attached hereto as Exhibit A) ("The Board's appropriation of a junior water right pursuant to C.R.S. 37-92-102(3) is a quasi-legislative action.").

3. As explained by the Water Court in the attached Order, a quasi-judicial action generally involves a determination of the rights, duties, or obligations of specific individuals by applying existing legal standards to past or present facts presented at a hearing to resolve the particular interest in question. Exhibit A, at 4-5. For example, a city council's review and approval of a developer's land-use development plan is a quasi-judicial action. *Cherry Hills Resort Development Co. v. City of Cherry Hills Village*, 757 P.2d 622, 628 (Colo. 1988). During a quasi-judicial proceeding, a party to the proceeding has the right to cross examine witnesses who testify at the hearing. C.R.S. § 24-4-105(4) (establishing procedures for agency adjudicatory hearings) (emphasis added).

4. Quasi-legislative action usually reflects some public policy relating to matters of permanent or general character, is not normally restricted to identifiable persons or groups, and is usually prospective in nature. Exhibit A, at p. 4. Procedural due process rights, such as the right to cross-examine witnesses, do not apply to quasi-legislative proceedings. Exhibit A, at 6.

5. The Board may develop its own procedures for quasi-legislative proceedings consistent with its statutory authority. Rule 5p.(1) of the Rules Concerning the Colorado Instream Flow and Natural Lake Level Program, 2 CCR 408-2 (the "Rules"), allows the Board to

“regulate the course of the hearing” and to “issue appropriate orders controlling the subsequent course of the proceedings.”

6. The Rules permit the Board to allow parties to question witnesses, but do not require the Board to allow cross-examination of witnesses. Rule 5p.(3) says that “[o]nly the Board may question witnesses at the hearing except where the Board determines that, for good cause shown, allowing the parties to question witnesses may materially aid the Board in reaching its decision, or where such questioning by the Parties relates to the statutory findings required by § 37-92-102(3)(c), C.R.S.” (emphasis added). On its face, the rule does not allow formal cross-examination. Instead, it allows limited questioning at the Board’s discretion when it determines that good cause has been shown.

7. It is apparent from other Board rules that the Board did not intend Rule 5p(3) to allow formal cross-examination or the Board would have stated that intention as it did elsewhere. For example, in Rule 9e.(4), the Board clearly expressed its intention to allow cross-examination during a hearing on a request to modify an existing instream-flow right. That rule states “[o]n the written request of any Person made within thirty days after the date of the first public meeting, the Board shall [...] establish fair and formal procedures for the subsequent public meeting, including the opportunity for reasonable disclosure, discovery, subpoenas, direct examination, and cross examination.” (emphasis added). Rule 9e.(4) thus requires the Board to establish formal procedures, including subpoenaing witnesses and cross-examining witness.

8. Rule 5p.(3) does not require the Board to establish formal procedures, does not allow parties to subpoena witnesses, and does not allow cross-examination of witnesses. Moreover, the hearing set for September 13 is limited to five hours, which must be divided amongst staff, five contesting parties who favor the instream flow appropriation, five contesting parties who oppose the appropriation, questioning by the Board members, and public comment. The time allotted for the hearing simply does not permit direct examination and cross-examination of witnesses. For the reasons stated herein, the Board should not allow formal cross-examination of witnesses.

Respectfully submitted this 12th day of August, 2011

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CERTIFICATE OF SERVICE

I hereby certify that I have duly served the copies of the foregoing Response to Motion to Conduct Limited Cross-Examination at Hearing upon all parties herein by email or depositing copies of the same in the United States mail or via email, postage prepaid, at Denver, Colorado, this 12th day of August 2011, addressed as follows:

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