

**COLORADO WATER CONSERVATION BOARD  
STATE OF COLORADO**

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**IN THE MATTER OF PROPOSED INSTREAM FLOW APPROPRIATION IN WATER  
DIVISION 4: DOLORES RIVER (“Lower Dolores” – confluence San Miguel River to  
confluence West Creek)**

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**NOTICE TO CONTEST INSTREAM FLOW APPROPRIATION**

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The Southwestern Water Conservation District, through its attorneys, Maynes, Bradford, Shipp & Sheftel, LLP, respectfully submits this Notice to Contest the proposed Lower Dolores River ISF pursuant to Rule 5k of the Rules Concerning the Colorado Instream Flow and Natural Lake Level Program, 2 C.C.R. 408-2 (the “ISF Rules”). The District, however, notes that it is engaged in what it hopes will be productive discussions with CWCB staff concerning conditions the District proposes for this proposed ISF. In an abundance of caution the District is filing this Notice in case a resolution of the issues identified herein cannot be reached.

**I. IDENTITY OF CONTESTING PARTY**

Southwestern Water Conservation District  
c/o Bruce Whitehead, Executive Director  
841 East Second Avenue  
Durango, CO 81301

Please direct all notices, pleadings, and correspondence to the District’s attorneys:

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**II. IDENTITY OF CONTESTED INSTREAM FLOW APPROPRIATION**

Div	Stream	Watershed	County	Length (miles)	Upper Terminus	Lower Terminus	Quad Sheet(s)	Flow (CFS)
4	Dolores River	Lower Dolores	Montrose, Mesa	34.21	confl. San Miguel River	confl. West Creek	Red Canyon, Roc Creek, Juanita Arch. Gateway	200 (3/16-4/14) 900 (4/15-6/14) 400 (6/15-7/15) 200 (7/16-8/14) 100 (8/15-3/15)

### III. CONTESTED FACTS TO THE EXTENT CURRENTLY KNOWN

A. Findings required by C.R.S. § 37-92-102(3)(c) and Rule 5i of the ISF Rules:

1. Whether there is a natural environment within the claimed reach of the Dolores River that can be preserved to a reasonable degree with the CWCB's proposed appropriation if granted.
2. Whether such natural environment within the claimed reach of the Dolores River will be preserved to a reasonable degree by the water available for the appropriation to be made.
3. Whether the appropriation claimed can exist without material injury to water rights.
  - a. Whether the methodology used by the CWCB to determine water availability based on the historical record can reliably predict future water availability and the impact of the proposed appropriation on prior valid water rights when climate models indicate that future precipitation and water supplies may be significantly diminished due to climate change.

B. Whether the appropriation amounts claimed are consistent with the requirements of C.R.S. § 37-92-102(3).

1. Whether the proposed appropriation would properly "correlate the activities of mankind with some reasonable preservation of the natural environment."
2. Whether "minimum stream flows" required "to protect the natural environment to a reasonable degree" justify appropriating all available water for an instream flow use or, instead, may be established to promote aquatic species viability only to a reasonable degree.

C. Compliance with the Constitution of Colorado, the Colorado River Compact, the Upper Colorado River Compact, and statutes providing for the beneficial use of available Colorado waters.:

1. Whether the proposed ISF appropriation would deprive the people of the State of Colorado of the beneficial use of those waters available by law. Constitution of Colorado, Article XVI, sections 5 and 6; C.R.S. § 37-92-102(3).
2. Whether the proposed ISF appropriation would deprive the people of the State of Colorado of the beneficial use of those waters available by interstate compact, § 37-92-102(3), including those waters apportioned to the State of Colorado by the Colorado River Compact, C.R.S. §§ 37-61-101, *et seq.*, and the Upper Colorado River Compact, C.R.S. §§ 37-62-101, *et seq.*

D. Protection of present uses and exchanges under C.R.S. § 37-92-102(3)(b), including the conditions that the Board should attach to any appropriation of the Dolores River ISF to insure that the ISF will be subject to the present uses or exchanges of water being made by other water users pursuant to appropriation or practices in existence on the date of such appropriation, whether or not previously confirmed by court order or decree.

E. Compliance with C.R.S. § 37-92-102(4)(a).

1. The terms and conditions that the Board should attach to any appropriation of the lower Dolores River, including without limitation the withdrawal of statements of opposition in water court cases, entry of stipulations for decrees or other forms of contractual agreements, including enforcement agreements, that will preserve the natural environment to a reasonable degree in a manner consistent with its obligations under Colorado law.

2. Whether, as a matter of policy, the CWCB should use its discretion to appropriate instream flows requested by the U.S. Bureau of Land Management when that agency and the U.S. Forest Service have failed to comply with the letter and spirit of their memoranda of understanding with the CWCB and the Colorado Department of Natural Resources by mandating the imposition of bypass flows as a condition of Colorado citizens exercising water rights perfected pursuant to Colorado law.

F. The District identifies the above contested facts to the extent known at this time and reserves the right to identify other contested factual and legal issues prior to or at a hearing in this matter.

#### **IV. GENERAL DESCRIPTION OF DATA UPON WHICH DISTRICT WILL RELY TO THE EXTENT CURRENTLY KNOWN**

A. Data concerning the impact on developable water supplies of the Lower Dolores River and, in particular, of its tributaries from the proposed ISF together with existing and potential bypass flows imposed by the United States.

B. Data concerning minimum instream flows required to promote aquatic species viability to a reasonable degree.

C. Climate modeling data predicting future precipitation and water supply impacts in the region.

D. All facts and data in the record of the CWCB to date, and in the files of the Colorado Division of Wildlife and U.S. Bureau of Land Management, regarding the proposed ISF.

E. All facts and data to be offered in rebuttal.

F. The District reserves the right to present other facts, data, documents, and factual and opinion testimony at a hearing on this matter.

Wherefore, the District contests the proposed appropriation of the Dolores River ISF and requests that a hearing officer be appointed in accordance with Rule 5n of the ISF Rules.

Respectfully submitted this 26th day of March, 2015.

MAYNES, BRADFORD, SHIPPS & SHEFTEL, LLP

by: \_\_\_\_\_

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