

BEFORE THE COLORADO WATER CONSERVATION BOARD

STATE OF COLORADO

Prehearing Statement of Staff of the Colorado Water Conservation Board

IN THE MATTER OF THE CWCB STAFF'S RECOMMENDATION FOR AN INSTREAM FLOW APPROPRIATION ON THE DOLORES RIVER, WATER DIVISION 4

Pursuant to Rule 5n. (2) of the Rules Concerning the Colorado Instream Flow and Natural Lake Level, 2 CCR 408-2 ("ISF Rules"), the Staff of the Colorado Water Conservation Board ("CWCB") hereby submits its prehearing statement in support of the Staff's recommendations for an instream flow ("ISF") appropriation on the subject reach of the Dolores River in the amounts set forth in the attached memorandum (attached as **Exhibit 1**).

A. FACTUAL CLAIMS

- 1) Based upon field surveys by Colorado Parks and Wildlife ("CPW") and the Bureau of Land Management ("BLM"), there is a natural environment that can be preserved on the subject reach of the Dolores River, in Mesa and Montrose Counties. That natural environment supports several environmental attributes identified by the Southwest Basin Roundtable: roundtail chub, flannelmouth sucker, bluehead sucker, river otter, and significant riparian and wetland communities (4/17/2015 Basin Implementation Plan Southwest Basin Roundtable Table 2, page 21). The riparian communities include New Mexico privet, skunkbrush, narrowleaf cottonwood and Fremont cottonwood. The Southwest Basin Roundtable identified this instream flow appropriation as an IPP ("Identified Project and Process") to meet nonconsumptive needs in the basin (4/17/2015 Basin Implementation Plan Southwest Basin Roundtable Appendix A).
- 2) The ISF rates recommended by Staff for the subject reach of the Dolores River:
 - a) are based upon standard scientific methodology and accurate R2Cross and PHABSIM (Physical Habitat Simulation) analyses;
 - b) reflect the amount of water available for appropriation as an ISF water right; and
 - c) are required to preserve the natural environment to a reasonable degree.
- 3) The natural environment on the subject reach of the Dolores River: (a) will be preserved to a reasonable degree with the proposed ISF water right; and (b) can exist without material injury to water rights.

B. LEGAL CLAIMS

- 1) Staff's recommendation for the Dolores River ISF meets all of the procedural requirements of the Rules Concerning the Colorado Instream Flow and Natural Lake Level Program, 2 CCR 408-2 ("ISF Rules").

- 2) ISF Rule 5j.(3) provides that “[i]n a hearing on a contested ISF appropriation, a Party may raise only those issues relevant to the statutory determinations required by section 37-92-102(3)(c) and the required findings in Rule 5i.” The required statutory determinations are: (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.
- 3) To implement section 37-92-102(3)(b), C.R.S. (2014), staff recommends including language in the CWCB’s ISF water court application and decree stating that “pursuant to section 37-92-102(3)(b), C.R.S. (2014), this instream flow appropriation shall 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 this appropriation, whether or not previously confirmed by court order or decree.” Staff also recommends including a provision in the decree specifically identifying such uses if the proponent provides adequate documentation and verification of present uses and exchanges within 3 months from the date of filing the ISF water court application. Staff recommends that after receiving verification, the decree include a description of the claimed use for administration of the instream flow water right as junior to the existing use, such as the following language:

Based upon the affidavit of [James Diverter] and discussions with the Water Commissioner, the CWCB agrees that [Mr. Diverter’s] diversion of water from Wet Creek for the first fill of and storage in [Beautiful Pond] in the amount of [5.05] acre-feet, and use of said stored water for irrigation of [Mr. Diverter’s] ___ acres of land, were uses of water in existence on the date the CWCB appropriated the instream flow water right applied for herein. The CWCB’s instream flow water right described herein is subject to [Mr. Diverter’s] water use described above pursuant to section 37-92-102(3)(b). The limited subordination of the instream flow water right to [Mr. Diverter’s] preexisting water use pursuant to section 37-92-102(3)(b) in this case shall not interfere with the administration of [Mr. Diverter’s] water rights as against other water rights, and shall not result in general subordination of the CWCB’s ISF water right decreed herein to any other water rights junior to that instream flow water right.
- 4) The instream flow right will not deprive the people of the state of Colorado of the beneficial use of those waters available by law and interstate compact.

While ISF Rule 5j.(3) does not include this as an issue that may be raised at the hearing (see (2) above), it is an important policy issue for the Board. The proposed instream flow water right will not deprive the people of the state of Colorado of the beneficial use of waters available by law and interstate compact.

A significant volume of water will remain available for new junior water rights and future water development.

- 5) The instream flow right will not materially injure water rights.

The proposed instream flow right will not materially injure any existing water rights. The proposed instream flow right cannot call-out senior water rights within or upstream of the ISF reach, and because the instream flow right will not consume any water, it will not injure downstream senior water rights. Therefore, the instream flow right will not materially injure water rights. Additionally, under section 37-92-102(3)(b), the instream flow water right will not impact water uses and practices existing on the date of this ISF appropriation, even if those uses and practices are not decreed.

- 6) The amount recommended for the instream flow right is the minimum amount of water necessary to preserve the natural environment.

Staff has provided the CWCB with evidence to support its intent to appropriate the minimum amount of water necessary to preserve the natural environment in this case.

The Colorado Supreme Court has declined to quantify “minimum stream flows” because such quantification is within the discretion and expertise of the CWCB, in consultation with CPW. See *Colo. River Water Conservation Dist. v. Colo. Water Conservation Board*, 594 P.2d 570, 576 (1979). “Factual determinations regarding such questions as which areas are most amenable to preservation and what life forms are presently flourishing or capable of flourishing should be delegated to an administrative agency which may avail itself of expert scientific opinion.” *Id.*, at 576. The Court recognized that environmental conditions will vary at each location and that the CWCB has the required expertise, as well as access to expert opinion, to determine the habitat to be preserved and the amount of water needed on a case by case basis. The Court upheld the CWCB’s determination that to protect the natural environment to a reasonable degree, it would suffice to appropriate minimum stream flows that would maintain the existing aquatic habitat and related fish production because the determination was not shown to be irrational or unfounded. *Id.* at 577.

In determining the minimum amount of water necessary to preserve the natural environment to a reasonable degree in this case, the CWCB will rely upon recommendations from Staff, the CPW and the BLM. The CWCB staff, CPW, and the BLM have cooperated in developing instream flow recommendations based on R2Cross and PHABSIM analysis, as well as standard field and office procedures including, but not limited to, collecting hydraulic and biologic data, surveying stream channel geometry, modeling instream hydraulic parameters, gage data and streamflow modeling. The determination of the minimum amount of water necessary to preserve the natural environment is properly based on the scientific expertise of Staff, CPW, and the BLM, and will be supported by the evidence at the hearing in this matter.

7) Staff reserves the right to supplement its claims in its Rebuttal Statement.

C. EXHIBITS TO BE INTRODUCED AT HEARING

- 1) January 15, 2014 Memorandum from Jeff Baessler and Linda Bassi to the CWCB, Agenda Item 29, containing the instream flow tabulation for the Dolores River ISF and Staff's request that the Board form its intent to appropriate, attached as **Exhibit 1**.
- 2) Letter from the CPW, dated December 30, 2013 and letter from BLM dated December 24, 2013, along with supporting field data, photographs, maps, gage data and water availability analysis, attached as **Exhibit 2**.
- 3) The CWCB Staff recommendation and executive summary containing the written recommendation for an instream flow appropriation on the Dolores River, attached as **Exhibit 3**. All or portions of the digital Microsoft Excel worksheets that were developed as part of staff hydrologic analyses may also be used as exhibits. These digital Excel files can be requested directly from CWCB staff.
- 4) Colorado Water Conservation Board *Rules Concerning the Colorado Instream Flow and Natural Lake Level Program*, 2 CCR 408-2, attached as **Exhibit 4**.
- 5) Gregory D. Espegren, *Development of Instream Flow Recommendations in Colorado Using R2Cross*, January 1996, attached as **Exhibit 5**
- 6) *Development of Instream Flow Recommendations in Colorado Using R2Cross for Microsoft Excel*, attached as **Exhibit 6**.
- 7) Range-Wide Conservation Agreement and Strategy for Roundtail Chub *Gila robusta*, Bluehead Sucker *Catostomus discobolus*, and Flannelmouth Sucker *Catostomus latipinnis*, attached as **Exhibit 7**.
- 8) March 12, 2013 Notice to the ISF Subscription Mailing List, indicating that the Dolores River may be considered for an instream flow appropriation at the January 2014 CWCB Board meeting, attached as **Exhibit 8**.
- 9) November 5, 2013 Notice to the ISF Subscription Mailing List, indicating that the Dolores River may be considered for an instream flow appropriation at the January 2014 CWCB Board meeting, attached as **Exhibit 9**.
- 10) February 4, 2014 Notice to the ISF Subscription Mailing List, indicating that the CWCB declared its intent to appropriate an ISF on the Dolores River at the January 2014 CWCB meeting, attached as **Exhibit 10**.
- 11) November 6, 2013 Memorandum from Jeff Baessler to the CWCB, Agenda Item 14, indicating that the Dolores River may be considered for an instream flow appropriation at the January 2014 CWCB Board meeting, attached as **Exhibit 11**.
- 12) March 1, 2013 Memorandum from Jeff Baessler to the CWCB, Agenda Item 29, indicating that the Dolores River may be considered for an instream flow appropriation at the January 2014 CWCB Board meeting, attached as **Exhibit 12**.
- 13) U.S. Geological Survey PHABSIM for Windows User's Manual, attached as **Exhibit 13**.

- 14) Richard Anderson & Greg Stewart, *Riverine Fish Flow Investigations*, attached as **Exhibit 14**.
- 15) Southwest Basin Roundtable Basin Final Southwest BIP Submitted 4-17-2015, attached as **Exhibit 15**.
- 16) Southwest Basin Roundtable Basin Final Southwest BIP Submitted 4-17-2015 Appendix A, attached as **Exhibit 16**.
- 17) Staff may introduce demonstrative, rebuttal or other exhibits as allowed by the Hearing Officer, the CWCB, or agreed upon by the Parties.
- 18) Staff may rely on any exhibits introduced or disclosed by any other party to this hearing.

D. WITNESSES

- 1) Jay Skinner, Physical Scientist and Instream Flow Coordinator for the CPW (resume provided upon request). Mr. Skinner will testify generally on how the CPW conducts R2Cross and PHABSIM analyses as a basis for ISF recommendations, and specifically on the R2Cross and PHABSIM analyses and other biological bases for the subject ISF appropriation. Mr. Skinner may give opinion and factual testimony.
- 2) Roy Smith, Water Rights and Instream Flow Coordinator for the BLM (resume provided upon request). Mr. Smith will testify generally on how the BLM conducts R2Cross and PHABSIM analyses as a basis for ISF recommendations, and specifically on the R2Cross and PHABSIM analyses and other biological bases for the subject ISF appropriation. Mr. Smith may give opinion and factual testimony.
- 3) Jeff Baessler, Deputy Section Chief of the CWCB Stream and Lake Protection Section (resume provided upon request). Mr. Baessler will testify on how the CWCB staff formulates the bases for its recommendations. Mr. Baessler may give opinion and factual testimony.
- 4) Brandy Logan, Water Resource Specialist for the CWCB (resume provided upon request). Ms. Logan will testify on how she conducted the water availability analysis for the subject ISF recommendations. Ms. Logan may give opinion and factual testimony.
- 5) Linda Bassi, Section Chief of the CWCB Stream and Lake Protection Section (resume provided upon request). Ms. Bassi may testify to policies and issues related to the Instream Flow Program.
- 5) Staff may call any witness declared by any other party to this hearing.

E. WRITTEN TESTIMONY

Staff is not submitting written testimony with its prehearing statement, but may submit written testimony with its rebuttal statement.

F. Legal Memoranda

Staff is not submitting legal memoranda with this prehearing statement, but may submit legal memoranda with its rebuttal statement.

Dated this 30th day of June, 2015

CYNTHIA H. COFFMAN
Attorney General

/s/

SUSAN J. SCHNEIDER, # 19961*
First Assistant Attorney General
Natural Resources and Environment Section
Attorneys for the Colorado Water Conservation Board
*Counsel of Record

CERTIFICATE OF SERVICE

I hereby certify that I have duly served the copies of the foregoing **PREHEARING STATEMENT OF THE STAFF OF THE COLORADO WATER CONSERVATION BOARD** upon all parties herein by email this 15th day of June 2015, addressed as follows:

Hearing Officer

Casey Shpall
Deputy Attorney General for Natural Resources
Colorado Attorney General's Office
1300 Broadway, 7th Floor
Denver, CO 80203
720-508-6295
casey.shpall@state.co.us

Party Status

<u>Colorado Water Conservation Board</u> Linda Bassi Colorado Water Conservation Board 1313 Sherman Street, Room 718 Denver, CO 80203 303-866-3441 ext. 3204 linda.bassi@state.co.us	<u>Colorado Water Conservation Board</u> Susan Schneider First Assistant Attorney General Colorado Attorney General's Office 1300 Broadway, 7th Floor Denver, CO 80203 (720) 508-6311 susan.schneider@state.co.us
<u>Bureau of Land Management</u> Roy Smith DOI, BLM, Colorado State Office 2850 Youngfield Street Lakewood, CO 80215-7093 303-239-3940 r20smith@blm.gov	<u>Colorado Parks and Wildlife</u> Jay Skinner Colorado Parks and Wildlife 6060 Broadway Denver, CO 80216 303-291-7260 jay.skinner@state.co.us
<u>Colorado River Water Conservation District</u> Peter Fleming P.O. Box 1120 Glenwood Springs, CO 81602-1120 970-945-8522 pfleming@crwcd.org	<u>Conservation Colorado Education Fund</u> <u>San Juan Citizens Alliance</u> <u>Western Resource Advocates</u> Robert Harris Bart Miller Western Resource Advocates 2260 Baseline Road, Suite 200 Boulder, CO 80302 303-444-1188 bart.miller@westernresources.org rob.harris@westernresources.org

<u>Dolores Water Conservancy District</u> <u>Southwestern Water Conservation</u> <u>District</u> John B. Spear Maynes, Bradford, Shipps & Sheftel, LLP P.O. Box 2717 Durango, CO 81302 970-247-1755 bspear@mbssllp.com	<u>John S. Hendricks</u> <u>Western Sky Investments, LLC</u> Mark E. Hamilton William H. Caile Holland & Hart LLP 600 E. Main St., Suite 104 Aspen, CO 81611-1991 970-925-3476 mehamilton@hollandhart.com whcaile@hollandhart.com
<u>Sheep Mountain Alliance</u> Jennifer Russell Russell & Pieterse, LLC PO Box 2673 Telluride, CO 81435 970-239-1972 jenny.russell@lawtelluride.com	

Contested Hearing Participant Status

San Miguel County Board of County Commissioners

Steven J. Zwick

P.O. Box 791

Telluride, CO 81435

970-728-3879

stevez@sanmiguelcounty.org

