

BEFORE THE COLORADO WATER CONSERVATION BOARD

STATE OF COLORADO

PREHEARING STATEMENT OF THE COLORADO RIVER WATER CONSERVATION DISTRICT

IN THE MATTER OF PROPOSED INSTREAM FLOW APPROPRIATION ON THE DOLORES RIVER BETWEEN THE CONFLUENCE WITH THE SAN MIGUEL RIVER AND THE CONFLUENCE WITH WEST CREEK, WATER DIVISION 4

Pursuant to Rule 5n(2) of the Rules concerning the Colorado Instream Flow and Natural Lake Level Program (“ISF Rules”), the Colorado River Water Conservation District (“River District”) hereby submits its prehearing statement concerning the proposed instream flow appropriation on the Dolores River between its confluence with the San Miguel River and the confluence with West Creek. The River District believes that the CWCB should not authorize the filing of an application to adjudicate the proposed ISF unless the CWCB exercises its statutory discretion to adopt terms and conditions that protect the ability of small-scale water users to meet their future needs if augmentation sources are not readily available.

A. FACTUAL and LEGAL CLAIMS

1. The River District is charged by its organic act with “the conservation, use, and development of the water resources of the Colorado river and its principal tributaries” (C.R.S. § 37-46-101). The portion of the proposed Dolores River ISF segment located in Mesa County is included in the River District’s boundaries.
2. The River District recognizes and appreciates the benefit that ISFs provide to the State of Colorado. In the 1970s and early 1980s, the River District asserted a number of policy-driven challenges to the CWCB’s ISF Program. However, since that time, the River District has been, and continues to be, a strong supporter of the ISF Program. ISF water rights help to protect the natural environment. In addition, ISF rights often play a central role in the development of compromise solutions amongst water users, conservation groups, and federal agencies that help to avoid unnecessary federal reserved water rights and intrusive federal land-management oversight. For example, the River District played a lead role in the development of the Upper Colorado River Wild & Scenic River Alternative Management Plan that relies, in part, on three significant ISF rights on the mainstem of the Colorado River. The Upper Colorado River Alternative Management Plan will soon be adopted as the preferred alternative to a federal finding that the subject river segments are suitable for Wild and Scenic Act designation. Similarly, the River District helped to establish the Colorado River Endangered Species Recovery Implementation Program, which relies in part on ISFs in the 15-Mile Reach section of the Colorado River.
3. Notwithstanding its overall support of the ISF Program, the River District believes that large-scale ISFs located downstream of existing and future demands (such as the proposed Dolores River ISF) can present unique problems for future water users. This is particularly

true for small-scale water users in situations where (1) the subject stream reach is not already fully-appropriated, and (2) no readily-available source of augmentation or replacement water exists to offset the depletions of future water demands upstream of the ISF.

4. High flow rate ISFs located downstream of existing and future demands have the potential to call out future uses and to frustrate future exchanges and changes of water rights. Large-scale water users can more-easily address the issues presented by large-scale downstream senior rights by incorporating storage projects and other sources of replacement water supplies into new water development. With the use of storage, the remaining unappropriated water in the basin can be developed by large-scale water users only by relying on the storage of water during high-flow periods, and then releasing that supply to replace (i.e., offset) junior depletions that otherwise would be subject to call by a senior ISF. Thus, even though the construction of new storage is massively expensive and time-consuming, it is at least a theoretically possible strategy for large-scale water users to develop any remaining water that is not commanded by a senior ISF.
5. However, the construction of new storage or other replacement supplies is effectively beyond the means and capabilities of most small-scale water users. This is true even when there is a substantial amount of remaining unappropriated water “above” the volume of water that is subject to call by the ISF. Smaller-scale water users in basins that are not already subject to call by a senior right in a fully-appropriated basin face the highest threat. Small-scale water users are less-concerned about the volume of water that remains unappropriated in the basin – instead, it is the probability of a senior call by the ISF that they must address.
6. Even though the proposed Dolores River ISF will leave a significant amount of unappropriated water remaining for development in the basin, the ISF could have a dramatic impact on the “little guy”, whose small-scale depletions must be replaced against the new demand presented by the ISF. The only way a junior water user can replace his or her depletions is with the construction of new storage facilities on tributaries upstream of the ISF, or by the dry-up and change of use of senior agricultural rights. Both options are overwhelmingly expensive for almost all small-scale water users. In addition, the construction of new storage facilities and the dry-up of senior agricultural rights presents significant environmental and policy problems that run counter to the environmental goals of the ISF Program.
7. The water availability analysis in the CWCB Staff’s Executive Summary is based on comparing the proposed ISF rates to the historical median flows. The basic goal in this type of analysis is to show that, for at least 50% of the time (half of the data points) there is water available in excess of the claimed flow rates. This demonstration can help to address the concern of large-scale water users that are more likely to incorporate storage projects into future water development. However, for the small-scale water user, the unfortunate corollary to the median analysis is that the ISF could be calling junior water rights for the other 50% of the time. Moreover, the CWCB Staff’s Executive Summary

shows that the proposed ISF is actually higher than the historical median for 14 days in July, August, and September. Thus, the probability that the proposed ISF will call out junior rights therefore is actually quite high. The likelihood of a call in July, August, and September will leave junior small-scale water users with little recourse other than the dry-up of agricultural lands to secure an augmentation source.

8. The volume of water claimed by the proposed ISF is quite substantial, especially when compared to recent large-scale instream flow appropriations. The CWCB's ISF for the Colorado River from Cabin Creek to the Eagle River (Case No. 11CW161, Water Division 5) is decreed for flow rates that range from 650 c.f.s. to 900 c.f.s. – the same high-end flow rate claimed for the proposed Dolores River ISF. The historical average volume (from 1985-2014) of the Colorado River at the downstream terminus (the Eagle River confluence) of that ISF is approximately 1.15 million acre-feet. In comparison, even though both ISFs have a peak flow rate of 900 c.f.s., the Dolores River has far less available water than the Colorado. The historical average volume of the Dolores River at the downstream terminus of the proposed ISF is approximately 430,000 acre-feet.
9. The River District therefore is concerned:
 - a. that the proposed ISF may be inconsistent with the CWCB's statutory direction "to correlate the activities of mankind with some reasonable preservation of the natural environment..." and with the statutory provision that specifies "(n)othing in this article shall be construed as authorizing any state agency... to deprive the people of the state of Colorado of the beneficial use of those waters available by law and interstate compact." (C.R.S. § 37-92-102(3)).
 - b. The proposed ISF may be greater than the statutorily required "minimum stream flows...to preserve the natural environment to a reasonable degree." (C.R.S. § 37-92-102(3)).
 - c. The proposed ISF may not be consistent with the CWCB's statutory direction "to promote the conservation of the waters of the state of Colorado in order to secure the greatest utilization of such waters...." (C.R.S. § 37-60-106(a))
 - d. The proposed ISF may be inconsistent with the CWCB's statutory responsibility to "(aid) in the protection and development of the waters of the state, for the benefit of the present and future inhabitants of the state...." (C.R.S. § 37-60-102)
10. The proposed ISF filing may be premature given the emerging consensus from the stakeholder-driver Dolores River Dialogue regarding land use designations and determinations to best protect both the natural environment and Colorado's reasonable opportunity to develop and use its water resources.
11. The River District believes that options exist to protect the natural environment to a reasonable degree while providing a small measure of stability to future small-scale water

users that currently do not have to replace all of their depletions as against an existing senior right.

- a. The CWCB has the exclusive authority to appropriate such waters of natural streams “as the Board determines may be required for minimum stream flows to preserve the natural environment to a reasonable degree.” CRS 37-92-102(3). Thus, the specific amount of an ISF appropriation is within the discretion of the CWCB. By way of example, the Board may determine to appropriate an ISF for a stream reach of 50 cfs from April 1 to June 30 and 25 cfs from July 1 to March 31 – even where the fishery data suggests that the 50 cfs flow rate should extend another two weeks to July 15th.
- b. Historically, small scale impacts to an ISF caused by junior water rights (usually up to 1% of the decreed ISF flow rate) were deemed to have an unquantifiable (i.e., de minimis) impact on the ISF and were not subject to curtailment by the ISF. More recently, that policy changed from a no-call determination against small depletions to simply a determination not to oppose an application for a de minimis depletion. The River District believes that this policy change is consistent with the decision in *Aspen Wilderness Workshop v. CWCB*, 901 P.2d 1251 (1995) (once decreed, the CWCB cannot administratively reduce the amount of an ISF water right). However, just as the Board has the discretion to determine the specific rates and time periods for an ISF, it can make other determinations and conditions as part of its discretionary appropriation process that it could not otherwise make after an ISF is decreed by the water court.
- c. For example, the CWCB has the discretion to determine that the natural environment can be preserved with a flow rate that is within the margin of error in accuracy for stream gages (which have a typical error rate of 5% for open-channel flow measurements). Stated in other words, the CWCB’s administrative discretion allows it to determine as part of its appropriation, that junior depletions which cannot be accurately measured because of the sensitivity of stream gages do not adversely impact the minimum stream flow necessary to preserve the environment to a reasonable degree. Thus, future depletions within the range of the gage sensitivity cannot accurately be measured and can be determined as part of the CWCB’s appropriation process to have only a de minimis non-injurious impact on the subject ISF.

B. EXHIBITS TO BE INTRODUCED AT HEARING

The River District does not anticipate introducing exhibits at the CWCB Hearing but may refer to existing CWCB ISF decrees in other matters, and exhibits introduced or submitted by other parties to the CWCB Hearing.

C. WITNESSES

The following individuals may provide testimony on behalf of the River District that summarizes and supports the information provided in this Pre-Hearing Statement. In addition, the

individuals below may provide testimony in rebuttal to testimony or evidence submitted by other parties.

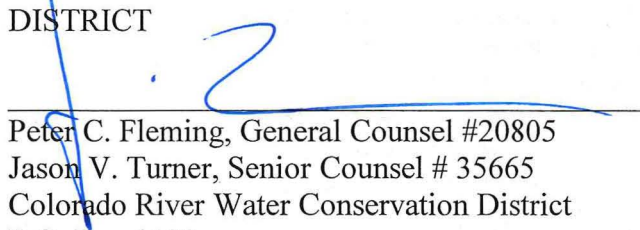
Peter C. Fleming, Colorado River Water Conservation District, General Counsel,
Jason V. Turner, Colorado River Water Conservation District, Senior Counsel,
R. Eric Kuhn, Colorado River Water Conservation District, General Manager
John Currier, P.E., Colorado River Water Conservation District, Chief Engineer.

D. ALTERNATIVES TO THE PROPOSED ISF

A consensus of interested stakeholders does not currently exist to support the proposed ISF. The River District believes that the potential for a compromise of the interested stakeholders exists. The potential to reach a consensus solution deserves additional time. The River District therefore recommends that the CWCB postpone taking any action to file an application to adjudicate the proposed ISF for an additional six months. Another alternative would be for the CWCB to direct filing an application but to condition its appropriation on the de minimis impact term described in paragraph 11.c., above.

Respectfully submitted this 30th day of June, 2015.

COLORADO RIVER WATER CONSERVATION
DISTRICT

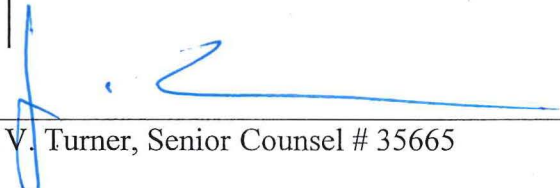


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CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2015, the above Prehearing Statement of the Colorado River Water Conservation District was served upon all parties herein by email as follows:

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