

BEFORE THE COLORADO WATER CONSERVATION BOARD

STATE OF COLORADO

IN THE MATTER OF PROPOSED INSTREAM FLOW APPROPRIATION IN WATER DIVISION 4: DOLORES RIVER ("Lower Dolores" confluence San Miguel River to confluence West Creek CWCB ID: 14/4A-006)

PREHEARING STATEMENT OF THE DOLORES WATER CONSERVANCY DISTRICT

In accordance with Rule 5n(2) of the Rules Concerning the Colorado Instream Flow and Natural Lake Level Program, 2CCR 408-2 (the "ISF Rules"), The Dolores Water Conservancy District ("DWCD") hereby submits its Prehearing Statement on the CWCB staff recommendation to appropriate an instream flow on the Dolores River between its confluences with the San Miguel River and the West Creek.

I. INTRODUCTION AND STATEMENT OF INTEREST OF THE DWCD.

The DWCD is statutorily organized to facilitate the conservation of, and provide for the greatest beneficial use of, the water of the Dolores. In furtherance of this, the DWCD operates the Dolores River Project which has as its central component McPhee Reservoir. The General Assembly has recognized that the development and construction of works such as McPhee Reservoir is a "public use essential for the public benefit of the people of this state." See C.R.S. 37-45-102. Accordingly, the DWCD is concerned that the ISF as currently proposed, without appropriate terms and conditions, may impair its ability to carry out its statutory charge.

The DWCD has engaged in productive negotiations with CWCB staff and arrived at consensus with Staff on protective terms and conditions. To the extent that these agreed terms and conditions can be accepted by CWCB and reduced to a predicate stipulation to the ISF appropriation, DWCD's opposition to the appropriation will be settled.

II. STATEMENT OF FACTUAL AND LEGAL CLAIMS ASSERTED.

The DWCD asserts that in formulating the proposed ISF the CWCB Board must adopt the protective terms and conditions which have been developed and agreed by CWCB staff and the District in order to insure that no injury may accrue to Dolores Project water rights, Project water allocations, or existing operations.

A. The Board is Authorized to Adopt the Agreed Proposed Terms and Conditions.

The CWCB Board enjoys broad discretion to reduce or condition an ISF appropriation. C.R.S. §37-92-102(4)(a) provides in pertinent part,

the board, in its discretion, may determine whether or not to appropriate minimum stream flows or natural lake levels, or decrease such an appropriation, to preserve the natural environment to a reasonable degree. ***The board may adopt conditions attached to an appropriation*** or decreased appropriation, may file or withdraw statements of opposition in water court cases, and ***enter into stipulations for decrees or other forms of contractual agreements, including enforcement agreements***, that it determines will preserve the natural environment to a reasonable degree.

Accordingly, it is within the Board's discretion to make an ISF appropriation subject to the following terms and conditions that have been recommended by CWCB staff and agreed to by DWCD.

The Staff and DWCD have agreed that the following terms and conditions are appropriate for implementation by the Board particularly given the unique hydrologic circumstances of the upper Dolores River and intervening large senior reservoir storage capacity that would store legally intercept any water that might be contributed by the upper Dolores to the ISF. The agreed terms and conditions are:

1. The CWCB shall not file Statements of Opposition based upon this ISF water right in applications for water rights above McPhee Dam that would add augmented structures to DWCD's augmentation and/or exchange plans in Case Nos. 95 CW 104, 96 CW 49, and 05 CW 44.
2. This ISF, if decreed, will be junior to all existing senior decrees on the Dolores and San Miguel Rivers and will be administered within the priority system. Therefore, a call by the CWCB for this junior right will not adversely affect the operation of the existing senior augmentation plan as outlined in Cases 95 CW 104, 96 CW 49, and 05 CW 44.
3. The ISF water right decreed herein is not intended to deprive the people of the State of Colorado of the beneficial use of those waters available pursuant to interstate compact. The CWCB agrees that this ISF water right will be administered by the State Engineer in accordance with rules duly promulgated by the State Engineer in accordance with applicable law related to the curtailment of Colorado River basin water uses within Colorado in order to comply with the Colorado River Compact of 1922 and the Upper Colorado River Basin Compact of 1948, including any such rules intended to avoid, delay, or limit the severity of such a compact curtailment.

4. As required by Colorado law, the CWCB staff will conduct reasonable reviews of water court applications made after the date of this ISF that may impact this ISF water right.
5. It is the Board's intent that this ISF water right is adequate to meet all requirements as a stream flow standard or guideline in federal administrative or regulatory permitting contexts.
6. In accordance with Rules 8e and 8f of the Rules Concerning the Instream Flow and Natural Lake Level Program (2009), for applications seeking new water rights, diligence for conditional water rights, or changes of water rights on the Dolores River, the CWCB will not file any Statements of Opposition to applications that will result in depletions that do not exceed a total of one percent (1%) depletive effect on the Dolores River ISF. This term and condition does not preclude the CWCB from enforcing this ISF appropriation in accordance with the priority system.
7. Pursuant to CRS 37-92-102(3)(b), this ISF is subject to present uses or exchanges in existence on the date of the ISF appropriation, whether or not confirmed by court order at the time of the court filing.
8. The CWCB shall not unreasonably deny injury with mitigation proposals for this ISF under Injury Accepted with Mitigation Rule 8i(3) of the Rules Concerning the Instream Flow and Natural Lake Level Program (2009).

B. Factual and Legal Claims.

Assuming, *arguendo*, that the foregoing agreed terms and conditions are not adopted by the Board in advancing this appropriation, DWCD reserves its right to assert that the proponents and staff have failed to establish the factual and legal predicates necessary to advance the appropriation in its current form, as more fully detailed below.

1. Failure to make findings required by C.R.S. § 37-92-102(3)(c) and Rule 5i of the ISF Rules:
2. Whether the appropriation amounts claimed are consistent with the requirements of C.R.S. § 37-92-102(3).

The amounts proposed appropriation do not properly “correlate the activities of mankind with some reasonable preservation of the natural environment” because the Staff has offered the Board only a single option when a balancing is required. That is, asserting the “minimum stream flow” required “to protect the natural environment to a reasonable degree” justifies appropriating all available water for an instream flow use or is inconsistent with the CWCB’s statutory charge when it is clear that many days that minimum is not met and yet the species have persisted.

3. 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.:

The proposed ISF appropriation of such magnitude and so close to the state line would deprive the people of the State of Colorado of the beneficial use of those waters otherwise available by law. Constitution of Colorado, Article XVI, sections 5 and 6; C.R.S. § 37-92-102(3). In addition, the proposed ISF appropriation deprives 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.*

4. Failure to protect existing uses and exchanges.

The protection of present uses and exchanges under C.R.S. § 37-92-102(3)(b) is addressed in the agreed terms and conditions, to the extent that they are not adopted by the Board, the DWCD asserts that the appropriation fails 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.

5. The Board should exercise its discretion to decline to consider appropriations advanced the United States.

As a matter of policy, the CWCB should not 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 within the Dolores River basin which have been lawfully diverted and perfected pursuant to Colorado law and are necessary to accomplish their decreed beneficial uses.

III. EXHIBITS TO BE INTRODUCED AT HEARING.

- A. Any exhibits endorsed by other parties in their Prehearing Statements.

IV. WITNESSES TO BE CALLED AND A DESCRIPTION OF THEIR TESTIMONY.

- A. Steve Harris, Mr. Harris will testify as DWCD's consulting engineer about the hydrology of the Dolores river, water availability and available contribution of water to the ISF from the upper Dolores.
- B. Ken Curtis, Mr. Curtis will testify about Dolores Project operations and the Operations of existing exchanges and upstream augmentation plans.
- C. Michael Preston, Mr. Preston will testify about Dolores Project operations and ongoing DWCD relationships with State and Federal governmental entities.

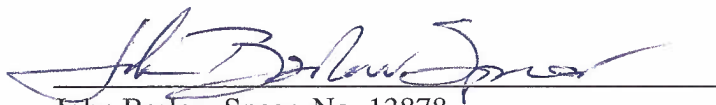
D. Witnesses who may be listed on other parties' Prehearing Statements.

V. ALTERNATIVE PROPOSAL TO THE PROPOSED INSTREAM FLOW.

DWCD requests the Board agreed to the terms and conditions negotiated with CWCB staff and include them as a predicate stipulations to the instream flow appropriation.

Dated this 29th day of June 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of June, 2015, a true and correct copy of the foregoing **PREHEARING STATEMENT OF THE DOLORES WATER CONSERVANCY DISTRICT** was delivered via e-mail, as follows:

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