

**COLORADO WATER CONSERVATION BOARD
STATE OF COLORADO**

**IN THE MATTER OF PROPOSED INSTREAM FLOW APPROPRIATION IN
WATER DIVISION 4: DOLORES RIVER**

**PREHEARING STATEMENT OF THE SOUTHWESTERN WATER
CONSERVATION DISTRICT**

The Southwestern Water Conservation District ("Southwestern"), through its attorneys, Maynes, Bradford, Shipp & Sheftel, LLP, respectfully submits this Prehearing Statement for the proposed Lower Dolores River instream flow appropriation pursuant to Rule 5n(2) of the Rules Concerning the Colorado Instream Flow and Natural Lake Level Program, 2 C.C.R. 408-2 (the "ISF Rules"):

PRELIMINARY STATEMENT

Contrary to statements made by other parties in this matter, Southwestern does not, as a matter of policy, oppose the appropriation of instream flows by the Colorado Water Conservation Board ("Board") for the benefit of the people of the State of Colorado. This is the first time, however, that Southwestern has been faced with the appropriation of an instream flow on a major river in Colorado just a few miles upstream of the State's border. In addition, by failing to incorporate a development allowance with the appropriation, the proposal results in appropriating the entire predicted available flow of the Lower Dolores River during substantial periods of many years. As such, the appropriation as proposed would bar development of any new municipal water supplies within and far upstream of the instream flow reach unless substantial storage reservoirs are constructed and expensive augmentation plans prosecuted in water court. In contrast, incorporating a modest development allowance would result in depletions to the instream flow smaller than the measurement error associated with the proposed amounts of the instream flow. Therefore, the Board, in the discretion it clearly enjoys as a matter of law, has a fundamental policy decision to make: (1) allow for inevitable municipal development in the counties of Dolores, San Miguel, Montrose and Mesa only through the construction of new reservoirs or (2) provide for, in the administrative terms of the instream flow appropriation, a small amount of water to remain available for direct diversion appropriations by and for the people of Colorado and those affected counties.

I. INTRODUCTION AND STATEMENT OF INTEREST

The Colorado General Assembly created the Southwestern Water Conservation District in 1941 to promote the conservation, use, and development of the waters of the San Juan and Dolores River basins in southwestern Colorado. Title 37, art. 47, C.R.S. A political subdivision of the State, Southwestern encompasses all of La Plata, Montezuma, Archuleta, San Juan, San Miguel, and Dolores counties and parts of Montrose, Hinsdale, and Mineral counties. C.R.S. § 37-47-103. Southwestern is statutorily charged with the conservation of the water of the San Juan and Dolores Rivers and their tributaries in order to facilitate the growth and development of the District and the welfare of its inhabitants, as well as to promote the health and general welfare of the state of Colorado. C.R.S. § 37-47-101. Accordingly, Southwestern was given such powers as may be necessary established to safeguard, for Colorado, “all waters to which the state of Colorado is equitably entitled.” *Id.* Southwestern, therefore, is concerned that the Lower Dolores River instream flow, as currently proposed, will infringe on Southwestern’s ability to carry out those statutory charges on behalf of the inhabitants of the District and the people of Colorado.

II. STATEMENT OF FACTUAL AND LEGAL CLAIMS ASSERTED

A. THE BOARD HAS AUTHORITY AND SHOULD INCORPORATE AN ADMINISTRATIVE CONDITION ALLOWING FOR JUNIOR DEPLETIONS EQUIVALENT TO LESS THAN ONE PERCENT OF ANY INSTREAM FLOW RATE IT APPROVES FOR THE LOWER DOLORES RIVER.

Southwestern and others request that as a condition of the instream flow appropriation approved by the Board, it provide for a depletion allowance for future municipal or industrial uses equivalent to one percent of the weighted average of the proposed instream flow rate, i.e. 2.7 cfs. Approving that modest allowance for future development is entirely consistent with Colorado law and past practice of the Board and would not undermine the protection of the environment in any measurable way while enabling the Board to meet the needs of the people of Colorado to provide a limited amount of orderly municipal growth and economic development.

1. The Board has broad discretion to determine the nature and terms of an instream flow appropriation.

The General Assembly conferred broad and exclusive discretion on the Board to determine appropriations of instream flows that are required to preserve the natural environment to a reasonable degree:

Further recognizing the need to correlate the activities of mankind with some reasonable preservation of the natural environment, the Colorado water conservation board is hereby vested with the exclusive authority, on

behalf of the people of the state of Colorado, to appropriate in a manner consistent with sections 5 and 6 of article XVI of the state constitution, such waters of natural streams and lakes as the board determines may be required for minimum stream flows or for natural surface water levels or volumes for natural lakes to preserve the natural environment to a reasonable degree.

C.R.S. §§ 37-92-102(3) (emphasis added) and -102(4)(a) (stating that the Board, “in its discretion, may determine whether or not to appropriate minimum stream flows” and “may adopt conditions attached to an appropriation”). So, for example, the Board has discretion to select a methodology to determine a required flow rate, to determine what flow rate is required, when it is required, the reach of a stream for which it is required, and how the instream flow water right shall be administered. But once that discretion is exercised by the Board to determine the terms of an instream flow appropriation and the appropriation and terms are confirmed in a decree from a water court, the Board does not have discretion to seek administration of the water right in any manner other than that confirmed in the decree. *Aspen Wilderness Workshop v. Colorado Water Conservation Bd.*, 901 P.2d 1251, 1260 (Colo. 1995) (holding that even where the Board’s appropriation was based on erroneous information “the Board was required to abide by the ruling of the water court” until it obtains an amended decree).

The Board’s discretion to determine the parameters of an instream flow is not boundless. First, the Board can appropriate no more water than necessary to preserve the natural environment to a reasonable degree. C.R.S. § 37-92-102(3); *Aspen* at 1257 (concluding that the Board “has the duty to appropriate *only the minimum* amount of water necessary to reasonably preserve the environment” and that its water rights “and its actual appropriation must comport with that duty”)(emphasis added). Second, the Board’s discretion must be exercised in the best interest of the people of Colorado. *Id.*; *Aspen* at 1256-57 (stating that the instream flow statute creates “a unique statutory fiduciary duty between the Board and the people of this state so that the Board may only appropriate a particular amount of water, i.e., the minimum amount necessary to preserve the natural environment”). Third, the Board must be mindful of the General Assembly’s recognition that preservation of the natural environment cannot be disconnected from the other activities of mankind. C.R.S. § 37-92-102(3); *In Re, Board of County Com'rs of County of Arapahoe*, 891 P.2d 952, 972 (Colo. 1995) (“The General Assembly has addressed the accommodation of the policy of maximum utilization of water and the policy of preservation of natural resources, but only in a limited way. It has expressed its concern that maximum utilization of water be balanced by preservation of the natural environment ‘to a reasonable degree’ by authorizing appropriations on behalf of the people of the state of Colorado for that latter purpose.”). Fundamentally, the Board’s authority to appropriate instream flows for the people of Colorado derives from the General Assembly’s recognition of “the need to *correlate the activities of mankind with some reasonable preservation of the natural environment*.” C.R.S.

37-92-102(3) (emphasis added). To “correlate” means “to establish a mutual or reciprocal relationship between.” Thus, in advancing an instream flow appropriation the Board is challenged with balancing preservation of the natural environment with other human needs, including future needs of the people of Colorado.¹

Those guideposts for the exercise of the Board’s discretion, however, create no bright lines and defer to the judgment and policy expertise of individual Board members. Rather than reflecting the implementation of readily articulable criteria, the Board’s determination of required instream flow ultimately reflects a weighing of various policy implications of a proposed instream flow. *Concerning Application for Water Rights of Colorado Water Conservation Bd. in the San Miguel River*, 346 P.3d 52, 59 (Colo. 2015) (stating that the appropriation of instream flows is a “prospective policy determination” that is “delegated to the CWCB” and that “the purpose of the CWCB’s notice, comment, and hearing process is to gather input from the public regarding this policy determination”). Therefore, while a technical methodology and other technical information can assist the Board with understanding the ramifications of each of those determinations (e.g., flow rate X will protect Y percent more habitat than flow rate Z), exercising its discretion necessarily requires individual Board members to judge what is in the best interest of Colorado citizens now and in the future (i.e., prospectively). Put another way, each Board member must determine an appropriate balancing of preserving the environment and providing for other beneficial uses of the waters of Colorado. Further, in its quasi-legislative role, the Board must serve the unique interests of all the people of Colorado with this instream flow appropriation. *Id.* at 56. The CWCB “acts on behalf of the People of the state of Colorado and is thereby burdened with a fiduciary duty arising out of its unique statutory responsibilities.” *Aspen* at 1259.

The ramifications of this balancing are more heightened for this proposed instream flow appropriation and the unique interests of the people of Colorado are implicated when all of the available flow of a major Colorado River during substantial periods would be dedicated to solely to the environment rather than direct human uses.

¹ Southwestern too, since its inception, has been vested with statutory authority to “file upon and hold for the use of the public sufficient water of any natural stream to maintain a constant stream flow in the amount necessary to preserve fish.” C.R.S. 37-47-107(1)(j). Southwestern recognizes that the preservation of natural environment for the benefit of the public is an important charge that can play an important role in regional economic development, provided it is properly correlated with the myriad other demands on our State’s water supplies.

2. CWCB staff's opposition to recognizing a de minimis development allowance amounts to a *de facto* policy favoring the construction of reservoirs to facilitate a modest amount of future development.

The hydrograph analysis presented in support of the proposed appropriation indicates that in many years the Lower Dolores River will not flow at the full magnitude of the appropriated flow during certain periods. Junior appropriations will be called out by the instream flow water right for substantial periods during such years. Therefore, with the adoption of the instream flow as proposed, the Dolores River is poised to join the “many Colorado basins [that] are fully appropriated or overappropriated” within which “it is infeasible to obtain a reliable supply of water based on new appropriations.” See *Colorado Water Conservation Bd. v. City of Central*, 125 P.3d 424, 439 (Colo. 2005).

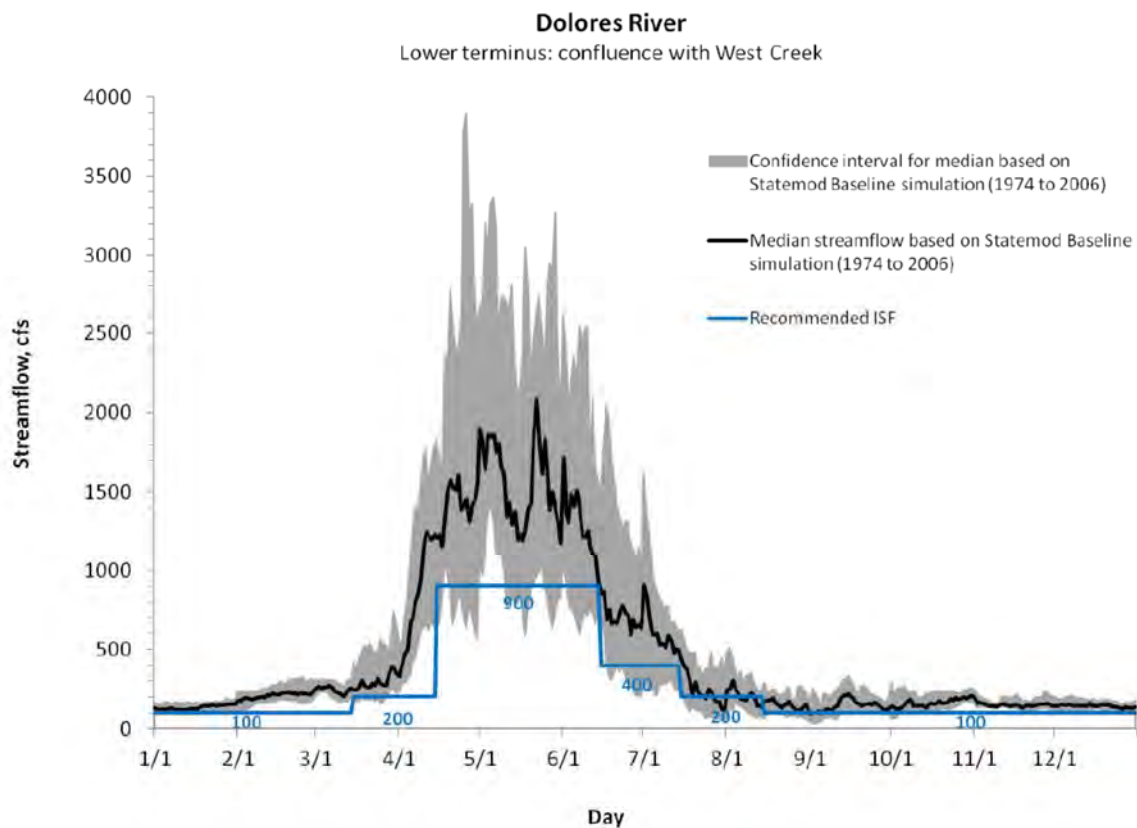


Figure 1 in the “Staff Analysis and Recommendation” for the proposed Lower Dolores River instream flow, at p. 13 and reproduced above, shows the median modeled flow in the Lower Dolores River with a 95% confidence interval. The confidence interval is to be interpreted to mean “there is 95% confidence that the true value of the median is located within the confidence interval.” “Staff Analysis and

Recommendation,” at p. 12 (2014). Therefore, the actual median flow (i.e., the flow rate exceeded or not met in half of years) for any given date may be substantially higher or lower. On dates where the median streamflow (dark line) is below the recommended instream flow rate (blue line), the analysis predicts that there will not be sufficient flow in the Lower Dolores to meet the proposed appropriation in approximately half of years. See “Staff Analysis and Recommendation” (2014) at pp. 9 (stating that “the initial water availability analysis performed by the CWCB suggests that 100 cfs is available at least 50% of the time during the time period between August 15 and March 14”) and 12 (stating that the proposed appropriation “is higher than the median for 6 days in July, 6 days in August, and 2 days in September”). Any gray area below the proposed instream flow rate (blue line) indicates that the median flows may actually be below the decreed flow rate on those dates (i.e., there is a significant probability in every year that flows will not be as high as the proposed instream flow rate on that date).

“Based on this analysis, staff concludes that water is available for appropriation.” “Staff Analysis and Recommendation” at p. 12. Staff appears to have selected flow rates that generally are lower than the predicted median flows. “Staff Analysis and Recommendation” at p. 9 (stating that “[t]he initial water availability analysis demonstrated that 900 cfs is available at least 50% of the time between April 15 and June 14, so no water availability adjustment was required during that time period” and that “[t]he flow rate of 100 cfs was not reduced to address water availability concerns, because the initial water availability analysis performed by the CWCB suggests that 100 cfs is available at least 50% of the time during the time period between August 15 and March 14”). What is not made clear by staff, however, is that water available would be available for appropriation only at times when the streamflow in the Lower Dolores River exceeds the proposed instream flow amounts. Even with the staff’s approach of selecting the proposed flow rates based on whether the median flow rate exceeds the proposed instream flow, in half the years it is predicted that for approximately two weeks there will be no water available for appropriation. Staff also neglects to discuss that in a substantial proportion of years, water will not be available for much greater periods (i.e., the gray area under the blue line). In other words, a municipal water provider that must obtain a junior water right will be subject to a call by the instream flow even in a median water year for approximately two weeks in half the years and for even a lengthier period in a substantial number of years.

If the instream flow is appropriated as proposed, new direct diversions and tributary wells located upstream of or within the instream flow reach will be required to provide a source of augmentation water and obtain a decreed augmentation plan. *Colorado Water Conservation Bd.*, 125 P.3d at 441 (holding that water rights junior to an instream flow must obtain a decreed augmentation plan that includes “terms and conditions protecting [a senior] instream flow from injury”). The source of augmentation water would need to be reservoirs that store water at times when it is available for appropriation. Therefore, future development of even a small amount of

consumptive use requiring a constant, reliable water supply (e.g., most industrial, domestic and municipal uses) and even non-exempt wells for domestic use will only be possible by constructing substantial new reservoirs. For example, to provide a firm yield of 5 cfs to supply a municipality would require constructing a minimum of 1,500 acre-feet of on-stream storage or even greater storage capacity if a reservoir is built off-stream (i.e., because storage rates at times when a reservoir is in priority would also be limited by the capacity of the diversion channel).

On the other hand, if the instream flow appropriation incorporates a de minimis development allowance, it would allow a modest amount of reliable water development while avoiding the need to construct reservoirs. A development allowance would ensure that water presented as available for appropriation actually is legally and physically available for diversion and use under junior water rights at all times during the year without the need to construct reservoirs. Opposition to such an allowance, therefore, represents a policy choice favoring the construction of reservoirs over enabling a small amount of direct diversions that could provide for a modest amount of use by future citizens of Colorado.

Providing for a development allowance would not conflict with or undermine in any way the fundamental purpose of appropriating instream flows: “to ensure that streams could not be dried up by subsequent upstream appropriators.” *Id.* at 439. The flow rate decreed in the instream flow would still be protected from injury by junior water rights and could never be substantially infringed. A small development allowance also would not affect the daily and seasonal variability in flow for which native fish are adapted, but on-stream reservoirs would. Indeed, the requested development allowance is significantly less in magnitude than the error rate of the gage that will be used to measure flows in the Lower Dolores River for the purpose of administering the instream flow.

B. THE BOARD SHOULD INCORPORATE RECOGNITION OF MEASUREMENT ERROR INTO THE ADMINISTRATION OF THE INSTREAM FLOW APPROPRIATION IT APPROVES FOR THE LOWER DOLORES RIVER.

1. Measurement error, if not accounted for, will enlarge the intended appropriation causing unintentional appropriation of water the Board may intend to leave available for appropriation.

Open-channel stream gages on rivers the size of the Lower Dolores River typically have an error rate of $\pm 5\%$. This means that a determination of when to place a call for an instream flow water right on the Lower Dolores River will be subject to error.² For example, if an instream flow is appropriated and decreed for 100 cfs, the

² Typical water rights involve diversions into constructed ditches and canals in which flow rates can be measured more precisely using weirs and flumes that have exact dimensions, span

Board would be expected to place a call on the Dolores River any time flows below 100 cfs are measured. However, given a 5% error rate in such instantaneous measurements, it is possible that even with a measurement as low as 95 cfs in fact the decreed flow rate would be met and a call would be unwarranted. In such circumstance, junior water rights accounting for up to 5 cfs of depletions from the instream flow reach could be called out, which would represent a great deal of potential upstream consumptive use that must be curtailed but which does not serve to meet the actual intent of the Board in appropriating 100 cfs to preserve the natural environment to a reasonable degree. Put another way, in such circumstances the Board's appropriation, at times, would in reality be for 105 cfs, rather than the nominal 100 cfs, and amount to a greater quantity than what the Board determined was required to preserve the natural environment to a reasonable degree.³ Therefore, if the instream flow appropriation is effectively enlarged by not accounting for measurement error, then reservoirs needed to ensure a firm yield under junior water rights will have to be built even larger.

2. An alternative approach to explicitly adopting a development allowance would be to account for measurement error in the terms governing administration of the appropriation.

Even recognizing a portion of the magnitude of the measurement error in the terms governing administration of the instream flow would have a similar effect to approving a development allowance and also would be within the sound discretion of the Board as a matter of law. If the Board provides that a call will not be placed when flows are measured within some percentage of the appropriated flow rates within the measurement error, it would ameliorate the risk of reducing the actual amount of water available for appropriation and the need to construct reservoirs to provide a firm yield for future municipal needs.

the width of the channel, and are sized and constructed to ensure laminar flow at relevant flow rates. Therefore, the typical water rights owner knows with some precision whether he or she is able to divert the full extent of the decreed flow rate or whether he or she is eligible to place a call.

³ Note also that typical water rights, unlike instream flow water rights, are limited by the amount of beneficial use rather than merely the diversion rate. Therefore, even if the diversion rate for a water right for irrigation, for example, is exceeded because of measurement error, the water right owner's use would still be limited to the amount consumed by crops, and the remainder would return back to the river.

C. THE APPROPRIATION AMOUNTS CLAIMED ARE NOT CONSISTENT WITH THE REQUIREMENTS OF C.R.S. § 37-92-102(3).

- 1. The proposed appropriation seeks more than the amount necessary to “preserve the environment to a reasonable degree” and does not properly “correlate the activities of mankind with some reasonable preservation of the natural environment.”**

The Board “has the duty to appropriate *only the minimum* amount of water necessary to reasonably preserve the environment” and “its actual appropriation must comport with that duty.” *Aspen* at 1257 (emphasis added). Further, in carrying out its statutory charge “to correlate” the activities of mankind with the preservation of the natural environment in addition to those findings specified in C.R.S. 37-92-102(3)(c) and the analogous ISF Rule 5i, the Board is charged with balancing the instream flow appropriations with other human demands by ascertaining whether the amounts claimed are the minimum amounts necessary and can operate without impairing Colorado’s ability to develop its compact entitlements. *Colorado Water Conservation Bd.*, 125 P.3d at 438 (noting that in authorizing the Board to appropriate instream flows “the General Assembly recognized as a basic tenet of Colorado water law the ‘need to correlate the activities of mankind with some reasonable preservation of the natural environment’ ”). Nowhere in the record before the Board has there been a recommended finding by staff seeking to balance these interests.

Rather than identifying or providing options for instream flow rates representing “*only* the minimum amount of water necessary to reasonably preserve the environment,” CWCB staff have proposed flow rates based on maximizing habitat for the identified species. See “Staff Analysis and Recommendation” at pp. 8 (identifying flowrates associated with “maximum amount of useable habitat” for bluehead and flannelmouth suckers, recommending flowrate greater than maximum usable amount for flannelmouth and protecting 90% of habitat for bluehead) and 9 (stating that “[t]he recommendation for the June 15 to July 14 and July 15 to August 14 time periods are designed to maintain as much bluehead sucker and flannelmouth sucker habitat as possible during a period of the year when flows are rapidly declining). While recommended flow rates were reduced based on “water availability,” the staff’s approach of generally selecting flowrate below the median predicted flow rate ensures that in a substantial number of years the instream flow will not be met. Absent from either approach to selecting flow rates (i.e., amount of habitat to be protected or median amount of water available) is any discussion of what is a “reasonable degree” for preserving the environment in this context. The fact that these species have persisted with flows substantially less than the minimum claimed in many years suggest that the proposed flows are not the minimum necessary and that a modest depletion allowance would be appropriate. The Board is not presented with any options to even debate as a policy matter. Could the environment be reasonably preserved if half of available

habitat is protected? Seventy-five percent? Staff has failed to provide the Board with an opportunity to evaluate what a reasonable degree might be, instead opting for the “maximum amount” and “as much as possible.” The Board cannot meet its statutory duty on that basis.

2. Climate change presents a risk that significantly less water will actually be available for future appropriation than is predicted by the water availability analysis.

The Board must consider whether the methodology used for the water availability analysis based on the historical record reliably predicts future water availability when climate models indicate that future precipitation and water supplies may be significantly diminished or more variable due to climate change. The staff’s analysis of water availability is based on historic measurements and indicates a great degree of variability. *See* grey area of the hydrograph reproduced above. Most climate models predict that future water yields in the southwest will be reduced compared to that period of record and that flows will be more variable (i.e., more extreme droughts and more extreme periods of high flows). *See* Fact Sheet for CWCB re “Climate Change in Colorado A Synthesis to Support Water Resources Management and Adaptation” (2014) (stating that “[f]or the Upper Colorado River Basin, multi-model average projections suggest decreases in runoff ranging from 6% to 20% by 2050 compared to the 20th century average, although one statistical streamflow model projects a 45% decline by 2050”).⁴ Developing reliable water supplies from a more variable hydrograph, unless there is an opportunity to continue appropriating modest direct diversions, will require constructing new, substantial reservoirs for storage.

3. The proposed instream flow appropriation may deprive the people of the State of Colorado of the beneficial use of those waters available by interstate compact, 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.*, but staff does not present any analysis of that issue so that the Board can make a rational decision in accordance with its duty under C.R.S. § 37-92-102(3) not to deprive Coloradans of the beneficial use of such waters.

In formulating the instream flow program the General Assembly also recognized that circumstances might arise in which otherwise justifiable instream flow appropriations might impair Colorado’s ability to develop its compact entitlements, stating,

⁴ <http://cwcb.state.co.us/environment/climate-change/Documents/COClimateReportOnePager.pdf>.

Nothing 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). The staff's proposal includes no analysis of how appropriating the recommended amounts will impact the ability of Colorado citizens to use their compact entitlements.

With respect to ascertaining whether the proposed ISF (coupled with those existing statewide) will impair Colorado's ability to develop its compact entitlements there has simply been no analysis. The Board should be particularly sensitive to making large ISF appropriations proximate to the stateline, which almost certainly will have the effect of conducting water to downstream states, impairing Colorado's future development. Indeed, the appropriation contemplated here by the Board is unprecedented in its potential to impact the interests of Colorado in waters to which it is entitled by interstate compact. Accordingly, under sound policy and the law, all parties and the people of the State are entitled to a detailed analysis of the impact of the proposed appropriation on Colorado citizens' ability to use waters apportioned to them by compact.

III. ALTERNATIVE PROPOSAL TO THE PROPOSED INSTREAM FLOW.

Southwestern requests the Board remand this matter to staff for further consideration of the following issues:

1. Identification of various options for defining "the minimum streamflow necessary to preserve the natural environment to a reasonable degree" and in a manner that correlates the future needs and activities of mankind with the reasonable preservation of the natural environment so that the Board can make a reasoned policy choice consistent with the General Assembly's delegation of authority to the Board on behalf of the people of the State of Colorado.
2. The impact of the proposed instream flow on the ability of Colorado citizens to develop water available by compact and in light of existing instream flows.
3. Development of thorough and transparent documentation of the application of the scientific methodologies used in advancing the instream flow proposal.

In addition, whether the matter is remanded to staff or the Board advances an appropriation now, pursuant to C.R.S. § 37-92-102(4)(a) Southwestern requests that the Board provide for a minimal development allowance for municipal and industrial uses of 1% of the weighted average of the instream flow rates it appropriates (i.e., 2.7 cfs for the recommended flow rates) and that it condition the administration of the instream

flow rate to not place a call unless the measured flow rate is more than 5% below the decreed flow rate.

In the alternative, Southwestern requests that the Board table this proposed instream flow until such time as a transparent, statewide, policy level discussion can be had about mechanisms to insure that these sort of large, stateline instream flows below population centers do not impair Colorado's ability to develop its compact entitlements or result in the inadvertent policy choice to build large reservoirs on these stream systems rather than countenance un-measurable, de minimus, impacts on decreed instream flows.

IV. EXHIBITS AND WITNESSES

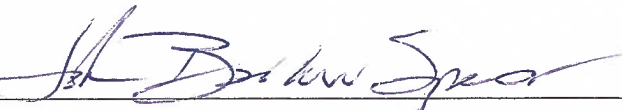
At the hearing, Southwestern may use all exhibits, data, and other information duly submitted by other parties in this matter. Southwestern anticipates calling Bruce Whitehead, Executive Director of Southwestern and Southwestern's consulting engineer, Steve Harris, to discuss the issues and information raised by the above claims. Southwestern reserves the right to identify additional exhibits and witnesses in its rebuttal statement.

V. CONCLUSION

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. The Board is being asked to make an unprecedented appropriation of a large Colorado river just upstream from the State line. Staff has not provided the Board with a range of options for meeting its statutory duties in appropriating instream flow with the result that the Board cannot make the full, reasoned, and unprecedented policy determinations required. In particular, staff has not provided options concerning the amount of habitat that should be preserved consistent with the instream flow statute and has not stated any policy tradeoffs being made by not allowing for a minimal development allowance or acknowledging how gage measurement error affects the intended availability of water. Southwestern, therefore, respectfully requests that the matter be remanded to staff to provide options consistent with the Board's statutory duties to appropriate instream flows. If, alternatively, the Board does advance an instream flow appropriation for the Lower Dolores River on the basis of the record before it, the Board should incorporate a de minimis development allowance and a recognition of measurement error in the terms and conditions for the appropriation.

Respectfully submitted 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 SOUTHWESTERN WATER CONSERVATION DISTRICT** was delivered via e-mail, as follows:

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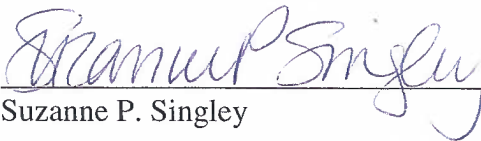
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