

BEFORE THE COLORADO WATER CONSERVATION BOARD

STATE OF COLORADO

**Prehearing Statement of the United States of America, Department of the Interior,
Bureau of Land Management**

IN THE MATTER OF STAFF'S RECOMMENDATIONS FOR AN 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 Bureau of Land Management ("BLM") hereby submits its prehearing statement in support of the Colorado Water Conservation Board ("CWCB") staff's recommendations for an instream flow appropriation on the Dolores River between the confluence with San Miguel River and the confluence with West Creek. The BLM supports the appropriation on the reach in the locations, timing, and amounts adopted by the CWCB at its January 2014 regularly scheduled board meeting. The CWCB adopted the locations, timing, and amount set forth in the CWCB staff recommendation report made available to the CWCB and the public at the January 2014 CWCB regularly scheduled board meeting (this recommendation is available for review on the CWCB's website at www.CWCB.state.co.us).

A. FACTUAL CLAIMS

1. There is a natural environment that can be preserved on the subject reach of the Dolores River. The finding of a natural environment is based upon fish surveys conducted by Colorado Parks and Wildlife ("CPW"), riparian inventories conducted by the BLM, and aquatic macroinvertebrate surveys conducted by the BLM.
2. The instream flow location, amount and timing originally recommended by the CWCB staff at the January 2014 board meeting:
 - a) is based upon standard field, office, and modeling procedures that are used to identify flow rates necessary to support water-dependent natural resource values. The standard procedures include collecting hydraulic and biologic data, surveying stream channel geometry, and modeling instream hydraulic parameters.
 - b) is based upon an accurate PHABSIM (Physical Habitat Simulation) analysis, which is a standard scientific methodology for identifying the amount of

physical habitat available for fish at various flow rates in a specified stream channel.

- c) is based upon a set of habitat suitability curves that are appropriate for the fish species and the life stages to be protected.
- d) is based upon a set of habitat suitability curves that are appropriate for the Dolores River stream channel.
- e) is based upon a reasonable selection of protective flow rates taken from the weighted usable area curves produced by the PHABSIM analysis.
- f) is based upon an accurate application of the R2Cross hydraulic modeling procedures.
- g) is based upon an accurate application of hydraulic criteria for instream flow determinations utilizing the R2Cross methodology.
- h) are required to preserve the natural environment to a reasonable degree., given the habitat needs, life histories, population composition, and conservation status of the species found in this stream segment.

3. The natural environment on the subject reach of the Dolores River:

- a) includes native and introduced fishes, aquatic macroinvertebrates, and riparian communities. The natural environment supports roundtail chub, flannelmouth sucker, and bluehead sucker, which appear on the BLM's sensitive species list. The natural environment also supports significant riparian communities and species, including New Mexico privet, skunkbrush, narrowleaf cottonwood, and Fremont cottonwood.
- b) can be preserved with an instream flow appropriation that is based upon the flow needs of flannelmouth sucker and bluehead sucker, because those species are indicator species for other elements of the natural environment that rely upon a hydrograph with a natural shape.
- c) will be preserved to a reasonable degree with the proposed ISF water right, and
- d) can exist without material injury to existing water rights, including conditional surface water rights and conditional storage rights.

4. The water availability analysis conducted by the CWCB in support of the January 2014 instream flow appropriation:

- a) is based upon scientifically accepted hydrologic analysis procedures.
- b) relies upon data from multiple historic gaging sites, all of which demonstrate that sufficient water is available for the proposed appropriation.
- c) reflects an amount of water that is available for appropriation as an ISF right, utilizing standard procedures employed by the CWCB to evaluate a range of hydrologic year types.
- d) reflects operational rules that have been implemented by the U.S. Bureau of Reclamation for the Dolores River Project since the project has been completed and become fully operational.

- e) reveals that the proposed instream flow water right will not appropriate all available water for instream use, but instead leaves a sizable volume of water available for future use and development.
5. The BLM supports the staff recommendations as set forth in the January 2014 Staff Report and Recommendation on the subject reach of the Dolores River.
 6. The BLM hereby adopts the factual claims set forth in the CWCB staff's Prehearing Statement.

B. LEGAL CLAIMS

1. The BLM is a party to these proceedings pursuant to Rule 51(4) of the ISF Rules.
2. Because ISF water rights are nonconsumptive and do not divert water from the stream, the CWCB can appropriate an ISF right that is based upon the flow of water that will be diverted downstream by a senior water right.
3. Even though the proposed ISF will be junior to existing water rights on the stream system, the CWCB can make appropriations based on water availability at the time of the proposed appropriation, without subtracting flow rates or volumes that have been adjudicated to conditional or presently unexercised water rights.
4. The proposed instream flow water right will not deprive the people of the State of Colorado of their right to develop the volume of water allocated to the State of Colorado under the Colorado River Compact. The proposed instream flow water right leaves substantial water volumes available for new junior water rights and future water development.
5. In determining the amount of water available for an instream flow appropriation, the CWCB is not limited to the amount of water available during drought years. Instead, the CWCB may consider the amount of water available in a range of hydrologic conditions.
6. The CWCB has the exclusive authority to determine the amount and timing of water necessary to preserve the natural environment to a reasonable degree.
7. The original CWCB staff ISF recommendation for the subject reach of the Dolores River meets all of the substantive and procedural requirements outlined in the ISF Rules.
8. The CWCB's appropriation of an instream flow water right on the subject reach of the Dolores River would further the express intent of Section 37-92-103(3), C.R.S. to "correlate the activities of mankind with some reasonable preservation of the natural environment."

9. The proposed instream flow water right is timely, because it will further develop the ongoing cooperative effort between the BLM and Colorado DNR to manage for river-related values that have been identified during the BLM's Wild and Scenic Rivers analysis processes. The proposed instream flow water right will not impede other cooperative processes that are designed to manage for river-related values in the Dolores River corridor, including the Dolores River Dialogue.

10. The proposed instream flow water right further develops and implements the Memorandum of Understanding between BLM and Colorado Department of Natural Resources concerning water management and land management. An instream flow water right held by the Colorado Water Conservation Board, combined with land use protections implemented by the BLM, will provide an optimal management foundation for the continued existence of fish and riparian species in this reach of the Dolores River.

11. The BLM hereby adopts the legal claims set forth in the CWCB staff's Prehearing Statement.

C. EXHIBITS TO BE INTRODUCED AT HEARING

1. January 2014 Staff Analysis and Recommendation on the subject reach of the Dolores River. This report, along with its appendices, contains maps of the proposed reach, proposed ISF amounts and timing, and water availability calculations. This report and supporting appendices are available for review on the CWCB's website at <http://cwcbweblink.state.co.us/WebLink/ElectronicFile.aspx?docid=174123&searchid=ea100ba0-da72-4c95-860e-b847ae02e33f&dbid=0>

In the hearing, BLM will refer to this report and its appendices as **Exhibit 1**.

2. Range-Wide Conservation Agreement and Strategy for Roundtail Chub, Bluehead Sucker, and Flannelmouth Sucker, September 2006. This document is available for review on the CWCB website at: <http://cwcbweblink.state.co.us/weblink/0/doc/195728/Electronic.aspx?searchid=db6c45ac-7f02-4dbb-9354-d10724934564>

In the hearing, BLM will refer to this report and its appendices as **Exhibit 2**.

3. Recommendation letters from the BLM and from Colorado Parks and Wildlife, along with supporting field data, photographs, maps, and water availability analysis. This information sets includes Colorado Parks and Wildlife fish sampling reports on the subject reach, completed in 2009 and 2010. These documents are available for review on the CWCB website at:

<http://cwcbweblink.state.co.us/weblink/0/doc/174141/Electronic.aspx?searchid=ea100ba0-da72-4c95-860e-b847ae02e33f>

In the hearing, BLM will refer to this report and its appendices as **Exhibit 3**.

4. U.S. Geologic Survey. PHABSIM for Windows User's Manual. This document is available for review of the CWCB website at:

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<http://cwcbweblink.state.co.us/weblink/0/doc/195719/Electronic.aspx?searchid=db6c45ac-7f02-4dbb-9354-d10724934564>

In the hearing, BLM will refer to this report and its appendices as **Exhibit 4**.

5. Gregory D. Espegren, Development of Instream Flow Recommendations Using R2Cross, dated January, 1996. This document is available for review on the CWCB website at: <http://cwcbweblink.state.co.us/weblink/0/doc/158688/Electronic.aspx?searchid=e14efb21-664b-47ed-92fc-fe9be91dbda8>

In the hearing, BLM will refer to this report and its appendices as **Exhibit 5**.

6. Development of Instream Flow Recommendations in Colorado Using R2Cross for Microsoft Excel. This document is available for review on the CWCB website at: <http://cwcbweblink.state.co.us/weblink/0/doc/195727/Electronic.aspx?searchid=db6c45ac-7f02-4dbb-9354-d10724934564>

In the hearing, BLM will refer to this report and its appendices as **Exhibit 6**.

7. The BLM may introduce demonstrative, rebuttal, or other exhibits as allowed by the CWCB or agreed upon by the Parties.

8. The BLM hereby adopts all Exhibits listed in the CWCB staff's Prehearing Statement.

9. The BLM may rely upon exhibits introduced or disclosed by any other party to this hearing.

D. WITNESSES

The following witnesses may testify at the hearing as described below, may give rebuttal testimony, and may be available at the hearing to answer questions from the CWCB.

1. Roy Smith, water rights and instream flow coordinator for the BLM (resume available upon request). Mr. Smith may testify about data collection methods, selection of data collection sites, PHABSIM modeling efforts, how the BLM formulates ISF recommendations, and specifically how he worked with CPW to formulate the BLM's recommendation for the subject reach of the San Miguel River.

2. Jedd Sondergard, BLM hydrologist for the Uncompahgre Field Office (resume available upon request). Mr. Sondergard may testify about the hydrologic and hydraulic characteristics of the subject reach of the Dolores River. In addition, Mr. Sondergard may testify regarding channel morphology, riparian characteristics, and fishery characteristics of the Dolores River.

3. Tom Fresques, BLM Colorado fisheries biologist (resume available upon request). Mr. Fresques may testify concerning the fishery composition of the Dolores River, the life history and habitat needs of the various fish species found in the Dolores River, the relationship between riparian habitat and fish habitat, and data collection methods for the fishery surveys completed in the Dolores River.

4. The BLM may call any witness declared by any other party to this hearing.

E. WRITTEN TESTIMONY

BLM does not seek to enter any written testimony at this time. The BLM hereby adopts any written testimony listed in the CWCB staff's Prehearing Statement.

F. LEGAL MEMORANDA

BLM does not seek to enter any legal memoranda at this time. The BLM hereby adopts any legal memoranda listed in the CWCB staff's Prehearing Statement.

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Respectfully submitted this 30th day of June, 2015.

A handwritten signature in blue ink, reading "Roy E. Smith", is written over a horizontal line.

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