

**BEFORE THE COLORADO WATER CONSERVATION BOARD**

**STATE OF COLORADO**

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**PREHEARING STATEMENT OF JOHN S. HENDRICKS AND WESTERN SKY INVESTMENTS, LLC**

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

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John S. Hendricks and Western Sky Investments, LLC (collectively, “Western Sky”), by and through their counsel Holland & Hart LLP, and pursuant to Rule 5n(2) of the Colorado Water Conservation Board (“CWCB” or the “Board”) Rules Concerning the Colorado Instream Flow and Natural Lake Level Program, 2 CCR 408-2 (the “ISF Rules”), hereby submit this Prehearing Statement in the above-captioned matter (the proposed “Dolores River ISF”). Western Sky notes, however, that at the present time it is engaged in discussions with CWCB staff concerning conditions and agreements relating to protection of Western Sky’s existing water rights and uses of water, which, if successful, may moot or otherwise resolve the issues raised in this Prehearing Statement.

**A. FACTUAL AND LEGAL CLAIMS**

Western Sky owns water rights and other interests in land and water that may be impacted by the proposed Dolores River ISF. Western Sky generally supports the efforts of the Board to preserve the natural environment in Colorado through appropriate instream flow appropriations, including in particular the protection of the natural environment in the reach of the lower Dolores River that is proximate to various properties owned by Western Sky. Western Sky is nonetheless participating in these proceedings at this time in order to protect its interests and ensure that the data presented (including any evidence presented by Western Sky and/or other parties) ultimately supports a finding that the factual and legal criteria for the Board’s instream flow appropriation have been met, including the following:

1. Whether the lower terminus of the claimed instream flow should be moved upstream, to a location above existing water diversions and at the location of the existing gaging station (USGS Gateway Gage). *See* C.R.S. § 37-92-102(3).
2. Whether the CWCB appropriately determined the availability of water for the claimed appropriation, including selection of a representative study period. *See* C.R.S. § 37-92-103(3)(c).
3. Whether the CWCB appropriately considered water availability during drought years, based on historical data, and whether the proposed Dolores River ISF would

deprive the people of the state of Colorado of the beneficial use of those waters available by law and interstate compact. *See* C.R.S. § 37-92-102(3).

4. Western Sky may request that the Board attach terms and conditions to any appropriation of the Dolores River ISF to ensure that the ISF will be subject to present uses or exchanges of water being made by Western Sky or other water users pursuant to appropriation or practices in existence on the date of such appropriation, whether or not previously confirmed by court order or decree. *See* C.R.S. § 37-92-102(3)(b).

The technical basis for Western Sky's above-stated claims is described in a letter report prepared by Wright Water Engineers, Inc. dated June 29, 2015 and attached hereto as Exhibit 1. Western Sky reserves the right to adopt or support the factual and legal claims and testimony presented by other parties to this proceeding, and to identify additional contested factual and legal matters in its rebuttal statement or at any hearing in this matter.

#### B. EXHIBITS

1. Letter Report prepared by Wright Water Engineers dated June 29, 2015 ("WWE Report").
2. Figure 1 to the WWE Report.
3. Any exhibits offered or identified by any other party, demonstrative exhibits, and any exhibits offered for rebuttal or impeachment purposes.

#### C. WITNESSES

The following individuals may provide testimony or statements on behalf of Western Sky that summarizes and supports the information provided in this Prehearing Statement.

1. Peter Foster, P.E., Wright Water Engineers, Durango, Colorado.
2. Mark E. Hamilton and/or William H. Caile, Holland & Hart LLP.
3. Any witness identified by any other party, and any witnesses presented for rebuttal or impeachment.

#### D. ALTERNATIVE PROPOSALS

As noted above, Western Sky is proposing that the downstream terminus of the instream flow be moved upstream to the location of the USGS Gateway Gage. Additionally, Western Sky is actively engaged in discussions with CWCB staff concerning conditions and agreements relating to protection of Western Sky's existing water rights and uses of water which, if successful, would resolve Western Sky's concerns with the CWCB's current proposal. Depending on the outcome of these discussions, Western Sky reserves the right to submit additional alternative proposals with its rebuttal statement in this matter.

E. WRITTEN TESTIMONY

Western Sky is not submitting written testimony at this time, but reserves the right to submit written testimony with its rebuttal statement.

F. LEGAL MEMORANDA

Western Sky is not submitting legal memoranda at this time, but reserves the right to submit legal memoranda with its rebuttal statement.

Respectfully submitted this 30th day of June, 2015.

HOLLAND & HART LLP



Mark E. Hamilton, #24585

William H. Caile, #32223

ATTORNEYS FOR JOHN S. HENDRICKS AND WESTERN  
SKY INVESTMENTS, LLC



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June 29, 2015

Via email: [mehamilton@hollandhart.com](mailto:mehamilton@hollandhart.com)

Mark Hamilton  
Holland and Hart, LLP  
600 East Main Street, Suite 104  
Aspen, CO 81611

Re: Review of the Dolores Instream Flow Recommendation

Dear Mark:

Wright Water Engineers, Inc. (WWE) completed a review of Bureau of Land Management (BLM) and Colorado Parks and Wildlife (CPW) Dolores River Instream Flow Recommendation (ISF Recommendation). A summary of the ISF Recommendation is provided in Table 1.

The review included researching the Colorado ISF Program guidance and requirements and comparing the ISF Recommendation's hydrograph to U.S. Geological Survey (USGS) stream gage data over two time periods. Based on this review, WWE has identified three areas of concern: 1) the proposed downstream terminus of the ISF reach; 2) the period of record chosen for the water availability analysis; and 3) the water available for future appropriations above and beyond the ISF Recommendation during a dry year.

### **Location of the Downstream Terminus**

The ISF Recommendation locates the lower terminus of the ISF reach as the confluence of the Dolores River and West Creek, which is downstream of several senior water rights points of diversion including the Casto Pumping Plant and Red Cross Ditch diversion (see Figure 1).

The Casto pumping plant has an absolute water right of 4.5 cubic feet per second (cfs) for irrigation, and an additional conditional water right of 4.5 cfs for pond filling, recreation and replacement. The Red Cross Ditch has an absolute water right of 10.09 cfs for irrigation, and an additional conditional water right of 10.09 cfs for pond filling, recreation and replacement. In addition, the Wines Ditch No 1 for 5.81 cfs can be diverted under an decreed alternate point of diversion at either the Casto Pump or the Red Cross Ditch. The water rights for the Dolores River Well Field and Lower West Creek Well field are conditional, with 2.04 cfs decreed for the following uses: domestic, irrigation, commercial, geothermal, recreation, piscatorial, industrial, municipal, livestock and replacement.

Currently the most appropriate gage to monitor the ISF Recommendation flow levels is the USGS Gateway Gage, located on the Hendricks bridge, approximately 1.2 miles upstream of the Highway 141 bridge in Gateway, CO. WWE recommends adjusting the downstream terminus of the ISF reach to the Gateway Gage in order to reduce future water rights administration complications.

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**EXHIBIT 1**

Relocating the ISF downstream terminus to the Gateway Gage will allow flows to be more accurately monitored, and thus reduce the potential for injury to senior water rights.

### **Period of Record Used for the ISF Recommendation**

The BLM created the hydrologic dataset used in its analysis by combining stream gage information for the San Miguel River at Uravan, CO, and stream gage information for the Dolores River at Bedrock, CO. The analysis focused on the overlapping period of record for the two gages between 1973 and 2012. BLM staff determined that the combined mean monthly flow from the two gages provides a conservative estimate of water availability.

This 40-year dataset both predates and postdates the construction of McPhee Dam and the Dolores Project, the delivery facilities for which include canals and laterals. McPhee Reservoir began filling in 1984 and by the year 2000, the majority of the Dolores Project's delivery facilities were completed. The use of a period record that predates the Dolores Project may not adequately reflect the water available for appropriation.

### **Water Available During a Dry Year**

Drought year conditions will limit water availability, and ISF Recommendation flow conditions may not be met for the period of April through September during a dry year. It is WWE's opinion that the ISF Recommendation should be revised to factor in drought year conditions.

### **Summary**

WWE recommends the following changes to the ISF Recommendation:

1. The downstream terminus of the ISF reach should be relocated to the location of the Gateway Gage as shown on Figure 1.
2. The ISF flow requirements may be revised based on hydrologic data for post development of the Dolores Project.
3. The ISF flow amounts should be revised based on drought year conditions.

Sincerely,

WRIGHT WATER ENGINEERS, INC.

By



Peter R. Foster, P.E.  
Vice-President

Mark Hamilton  
June 29, 2015  
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**Attachments:**

Table 1: BLM/CPW Recommended In-Stream Flows (ISF)  
Figure 1: Dolores River, Gateway Colorado

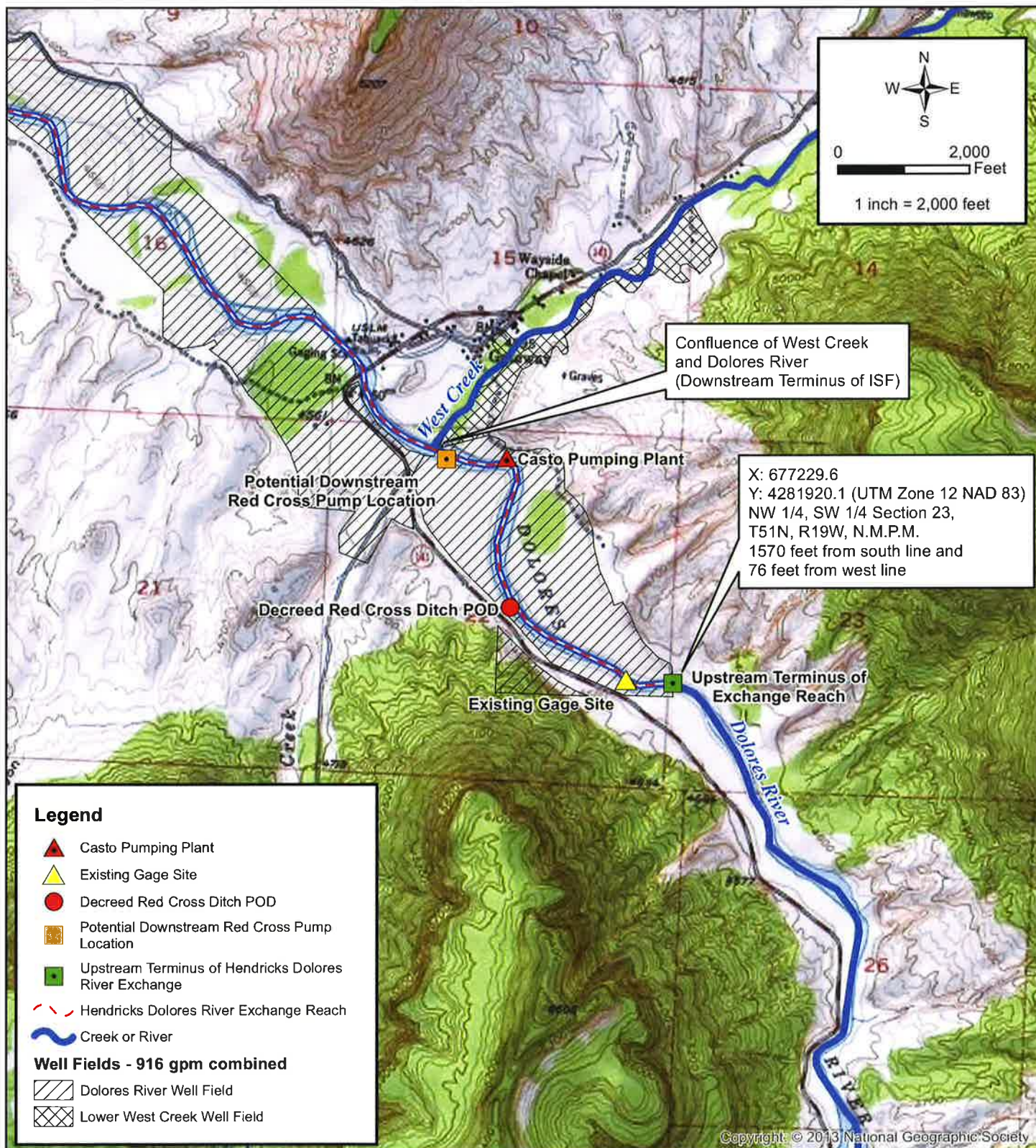
cc: Bill Caile, Esq., Holland and Hart, LLP

**Table 1**  
BLM/CPW Recommended In-Stream Flows

Time Period	% of 365-day year	Recommended Flow Rate
April 15 to June 14 (61 days)	16.7%	900 cfs
June 15 to July 14 (30 days)	8.2%	400 cfs
July 15 to August 14 (31 days)	8.5%	200 cfs
August 15 to March 14 (212 days)	58.0%	100 cfs
March 15 to April 14 (31 days)	8.5%	200 cfs

Source: Colorado Water Conservation Board Executive Summary, CWCB ID: 14/4/A-006





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**WWE**  
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MESA COUNTY, COLORADO

**DOLORES RIVER, GATEWAY, CO**

TOWNSHIP 51 NORTH, RANGE 19 WEST, N.M.P.M.  
 TOWNSHIP 15 SOUTH, RANGE 104 WEST, SIXTH P.M.

PROJECT NO.  
 021-053.033

FIGURE  
 1