

BEFORE THE COLORADO WATER CONSERVATION BOARD

STATE OF COLORADO

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**Prehearing Statement of Staff of the Colorado Water Conservation Board**

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IN THE MATTER OF THE CWCB STAFF'S RECOMMENDATIONS FOR  
INSTREAM FLOW APPROPRIATIONS ON TERROR CREEK, WATER DIVISION

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Pursuant to Rule 5n. (2) of the Rules Concerning the Colorado Instream Flow and Natural Lake Level, 2 CCR 408-2 ("ISF Rules"), the Staff of the Colorado Water Conservation Board ("Staff") hereby submits its prehearing statement in support of the Staff's recommendations for instream flow ("ISF") appropriations on the subject reaches of Terror Creek in the amounts set forth in the attached memorandum (attached as **Exhibit 1**).

**A. FACTUAL CLAIMS**

- 1) Based upon field surveys by the Bureau of Land Management ("BLM"), there is a natural environment that can be preserved on the subject reaches of Terror Creek, in Delta County.
- 2) The ISF rates recommended by Staff for the subject reaches of Terror Creek:
  - a) are based upon standard scientific methodology and accurate R2Cross analyses;
  - b) reflect the amount of water available for appropriation as an ISF water right; and
  - c) are required to preserve the natural environment to a reasonable degree.
- 3) The natural environment on the subject reaches of Terror Creek: (a) will be preserved to a reasonable degree with the proposed ISF water right; and (b) can exist without material injury to water rights.

**B. LEGAL CLAIMS**

- 1) Staff's recommendation for the Terror Creek ISFs meets all of the procedural requirements of the Rules Concerning the Colorado Instream Flow and Natural Lake Level Program, 2 CCR 408-2 ("ISF Rules").

2) ISF Rule 5j.(3) provides that “[i]n a hearing on a contested ISF appropriation, a Party may raise only those issues relevant to the statutory determinations required by section 37-92-102(3)(c) and the required findings in Rule 5i.” The required findings are: (1) that there is a natural environment that can be preserved to a reasonable degree with the Board’s water right if granted; (2) that the natural environment will be preserved to a reasonable degree by the water available for the appropriation to be made; and (3) that such environment can exist without material injury to water rights.

3) To implement section 37-92-102(3)(b), C.R.S. (2014), staff recommends including language in the CWCB’s ISF water court application and decree stating that “pursuant to section 37-92-102(3)(b), C.R.S. (2014), this instream flow appropriation shall 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 this appropriation, whether or not previously confirmed by court order or decree.” Staff also recommends including provisions in the decree that specifically identify such uses, if any proponent provides adequate documentation and verification of present uses and exchanges within 3 months from the date of filing the ISF water court application or within other reasonable time. Staff recommends that after receiving verification, the decree include a description of the claimed use for administration of the instream flow water right as junior to the existing use, such as the following language:

Based upon the affidavit of [James Diverter] and discussions with the Water Commissioner, the CWCB agrees that [Mr. Diverter’s] diversion of water from Wet Creek for the first fill of and storage in [Beautiful Pond] in the amount of [5.05] acre-feet, and use of said stored water for irrigation of [Mr. Diverter’s] \_\_\_\_ acres of land, were uses of water in existence on the date the CWCB appropriated the instream flow water right applied for herein. The CWCB’s instream flow water right described herein is subject to [Mr. Diverter’s] water use described above pursuant to section 37-92-102(3)(b). The limited subordination of the instream flow water right to [Mr. Diverter’s] preexisting water use pursuant to section 37-92-102(3)(b) in this case shall not interfere with the administration of [Mr. Diverter’s] water rights as against other water rights, and shall not result in general subordination of the CWCB’s ISF water right decreed herein to any other water rights junior to that instream flow water right.

4) The proposed instream flow right will not materially injure any existing water rights. The proposed instream flow right cannot call out senior water rights within or upstream of the ISF reach, and because the instream flow right will not consume any water, it will not injure downstream senior water rights. Therefore, the instream flow right will not materially injure water rights.

Additionally, under section 37-92-102(3)(b), the instream flow water right will not impact water uses and practices existing on the date of this ISF appropriation, even if those uses and practices are not decreed.

5) Staff reserves the right to supplement its legal claims in its Rebuttal Statement.

### **C. EXHIBITS TO BE INTRODUCED AT HEARING**

- 1) January 25, 2015, Memorandum from Jeff Baessler and Linda Bassi to the CWCB, Agenda Item 13, containing the instream flow tabulation for the Terror Creek ISFs and Staff's request that the Board form its intent to appropriate, attached as **Exhibit 1**.
- 2) Letter from the BLM, dated December 22, 2014, along with supporting field data, photographs, maps and water availability analysis, attached as **Exhibit 2**.
- 3) The CWCB Staff recommendations and executive summaries containing the written recommendations for instream flow appropriations on Terror Creek, attached as **Exhibit 3**.
- 4) Colorado Water Conservation Board *Rules Concerning the Colorado Instream Flow and Natural Lake Level Program*, attached as **Exhibit 4**.
- 5) Gregory D. Espegren, *Development of Instream Flow Recommendations in Colorado Using R2Cross, January 1996*, attached as **Exhibit 5**.
- 6) *Development of Instream Flow Recommendations in Colorado Using R2Cross for Microsoft Excel*, attached as **Exhibit 6**.
- 7) March 12, 2014, Notice to the ISF Subscription Mailing List, indicating that two reaches of Terror Creek may be considered for an instream flow appropriation at the January 2015 CWCB Board meeting, attached as **Exhibit 7**.
- 8) November 6, 2014, Notice to the ISF Subscription Mailing List, indicating that two reaches of Terror Creek may be considered for an instream flow appropriation at the January 2015 CWCB Board meeting, attached as **Exhibit 8**.
- 9) January 30, 2015, Notice to the ISF Subscription Mailing List, indicating that the CWCB declared its intent to appropriate ISFs on two reaches of Terror Creek at the January 2015 CWCB meeting, attached as **Exhibit 9**.
- 10) November 20, 2014, Memorandum from Jeff Baessler to the CWCB, Agenda Item 19, indicating that two reaches of Terror Creek may be considered for an instream flow appropriation at the January 2015 CWCB Board meeting, attached as **Exhibit 10**.

11) March 1, 2014, Memorandum from Jeff Baessler to the CWCB, Agenda Item 21, outlining 43 instream flow recommendations being noticed and processed by staff for possible inclusion into the Instream flow and Natural Lake Level Program in 2015, including the subject reaches of Terror Creek, attached as **Exhibit 11.**

13) Staff may introduce demonstrative, rebuttal or other exhibits as allowed by the Hearing Officer, the CWCB or agreed upon by the Parties.

14) Staff may rely on any exhibits introduced or disclosed by any other party to this hearing.

#### **D. WITNESSES**

1) Roy Smith, Water Rights and Instream Flow Coordinator for the BLM (resume provided upon request). Mr. Smith will testify generally on how the BLM conducts R2Cross analyses as a basis for ISF recommendations, and specifically on the R2Cross analyses and other biological bases for the subject ISF appropriations. Mr. Smith may offer opinion and factual testimony.

2) Jay Skinner, Physical Scientist and Instream Flow Coordinator for the Colorado Parks and Wildlife (‘CPW’) (resume provided upon request). Mr. Skinner will testify generally on how the CPW conducts R2Cross analyses as a basis for ISF recommendations, and specifically on the R2Cross analyses and other biological bases for the subject ISF appropriations. Mr. Skinner may offer opinion and factual testimony.

3) Jeff Baessler, Deputy Section Chief of the CWCB Stream and Lake Protection Section (resume provided upon request). Mr. Baessler will testify on how the CWCB staff formulates the bases for its recommendations. Mr. Baessler may offer opinion and factual testimony.

4) Brandy Logan, Water Resource Specialist for the CWCB (resume provided upon request). Ms. Logan will testify on how she conducted the water availability analysis for the subject ISF recommendations. Ms. Logan may offer opinion and factual testimony.

5) Linda Bassi, Section Chief of the CWCB Stream and Lake Protection Section (resume provided upon request). Ms. Bassi may testify to policies and issues related to the Instream Flow Program.

5) Staff may call any witness declared by any other party to this hearing.

**E. WRITTEN TESTIMONY**

Staff is not submitting written testimony with its prehearing statement, but reserves the right to submit written testimony along with its rebuttal statement.

**F. Legal Memoranda**

Staff is not submitting legal memoranda with this prehearing statement, but reserves the right to submit legal memoranda along with its rebuttal statement.

Dated this 30<sup>th</sup> day of June, 2015

CYNTHIA H. COFFMAN  
Attorney General

*/s/ Derek L. Turner*

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DEREK L. TURNER,\* # 44091  
Assistant Attorney General  
Natural Resources and Environment Section  
Attorneys for the Staff of the Colorado Water Conservation Board  
\*Counsel of Record

## CERTIFICATE OF SERVICE

I hereby certify that I have duly served the copies of the foregoing **PREHEARING STATEMENT OF THE STAFF OF THE COLORADO WATER CONSERVATION BOARD** upon all parties herein by email, this 30<sup>th</sup> day of June 2015, addressed as follows:

### **Hearing Officer**

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### **Party Status**

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