

BEFORE THE COLORADO WATER CONSERVATION BOARD

STATE OF COLORADO

REBUTTAL STATEMENT OF THE COLORADO RIVER WATER CONSERVATION DISTRICT

IN THE MATTER OF PROPOSED 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(5) of the Rules concerning the Colorado Instream Flow and Natural Lake Level Program (“ISF Rules”) of the Colorado Water Conservation Board (“CWCB”), the Colorado River Water Conservation District (“River District”) hereby submits its rebuttal statement pursuant to concerning the proposed instream flow appropriation on the Dolores River between its confluence with the San Miguel River and the confluence with West Creek, Water Division 4.

A. The CWCB has quasi-legislative authority concerning instream flow water rights.

The Colorado Water Conservation Board’s actions concerning its instream flow water right program are “quasi-legislative” in nature. *Farmers Water Development Co. c. CWCB*, 346 P.3d 52 (Colo. 2015). Thus, the CWCB has broad discretion regarding the subjects to which it has been delegated concerning the instream flow water right program.

B. The CWCB’s authority allows it to condition the appropriation of instream flow water rights on terms and conditions that limit enforcement of an ISF water right.

The CWCB has exercised its quasi-legislative authority in other instream flow cases to impose conditions that limit the ability of the CWCB to impose a call for enforcement of instream flow water rights. In Case Nos. 11CW159, 11CW160, and 11CW161, Water Division 5, the CWCB conditioned the appropriation of its main-stem upper Colorado River instream flows on terms that will prevent the CWCB from imposing a call on those rights. The pertinent text of this condition can be found at paragraph 20.C of the decree entered March 26, 2013 in Case No. 11CW161 (the language is the same in all three upper Colorado River instream flow decrees):

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. *If no such compact curtailment rules have been promulgated, then it is the intent of the CWCB that the CWCB will not place a call for this ISF water right during any specific period of time* identified by the Upper Colorado River Commission in a finding issued pursuant to Article VIII(d)(8) of the Upper Colorado River Basin Compact of 1948 for curtailment of Colorado River basin water uses within Colorado, which the State of Colorado implements in a manner that curtails water diversions within Water Division 5.

(Emphasis added).

The effect of this condition is that, when a “compact curtailment” is in place, the CWCB agrees not to call its instream flow water rights on the upper Colorado River when other water diversions have been curtailed, regardless of whether those diversions are junior in priority to the CWCB’s rights. In fact, the specific purpose of this condition is to facilitate future, currently-undecreed exchanges with junior administrative priorities through the instream flow reach during the curtailment period. The term does not quantify or limit the extent of the impact to the instream flow rights that will be caused by the junior exchanges. Thus, it is possible that the potential impact to the Colorado River instream flows could be quite large – certainly larger than the de minimis depletion concept suggested in the River District’s Pre-Hearing Statement in this case.

It also is important to note that the limiting terms of the appropriations in the upper Colorado River instream flows are not necessary in order to allow Colorado to make full use of its Colorado River Compact entitlement. By definition, Colorado has reached its compact entitlement during any period of “compact curtailment” that is contemplated by the term quoted above. The term is therefore intended to facilitate the optimum utilization of water – the same issue that the River District seeks to address by suggesting the inclusion of a de minimis depletion.

The River District does not believe that a 5% de minimis depletion condition is necessary or appropriate in this case. Instead, the River District recommends a de minimis depletion of *less than* 5% (in the discretion of the CWCB) can reasonably protect future small-scale water users from the adverse impacts of the proposed large Dolores River instream flow, while still protecting the instream flow from any physically-measurable impact.

[Signature on following page]

Respectfully submitted this 17th day of August, 2015.

COLORADO RIVER WATER CONSERVATION
DISTRICT



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CERTIFICATE OF SERVICE

Pursuant to the June 5, 2015, Notice of Prehearing Conference & Deadlines for Submissions, I hereby certify that on August 17, 2015, five (5) copies of the Rebuttal Statement of the Colorado River Water Conservation District was sent to the CWCB via Federal Express and served upon all the parties herein by email identified in the River District's "CWCB – 2015 Dolores ISF" Outlook Contact Group list as follows:

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