

**COLORADO WATER CONSERVATION BOARD
STATE OF COLORADO**

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

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

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

I. REBUTTAL OF FACTUAL AND LEGAL CLAIMS ASSERTED

**A. THE PARTIES GENERALLY AGREE ON THE BROAD OBJECTIVES OF THE
PROPOSED INSTREAM FLOW.**

All parties agree with the policy objectives underlying the proposal by the Staff of the Colorado Water Conservation Board ("CWCB"): appropriate an instream flow to preserve the environment of the Lower Dolores River to a reasonable degree that also appropriately balances with the activities of mankind. Therefore, the primary issue for this hearing is how to get there. Southwestern's requests in this matter are intended to encourage the CWCB to more fully consider the policy trade-offs inherent in the proposal so that the CWCB can accomplish those objectives in a measured manner fit to the unique and complex legal and policy issues this unprecedented proposal raises. Adopting the Staff's recommendation and failing to incorporate appropriate terms and conditions would implement an overly-simplistic approach that paralyzes local community development and promises consequences the CWCB no doubt does not intend. The Staff's proposal would harm future small-scale water users and incentivize the development of large water storage projects to meet future demands, yet no other party besides Southwestern and the Colorado River Water Conservation District ("River District" or "CRWCD") has offered any discussion of those implications. For those reasons, Southwestern and the River District requested that the CWCB remand this matter to Staff to more fully evaluate water availability and other policy

implications of appropriating such an extreme portion of a major river's flows as an instream flow located just upstream of the State line. Failing that, both Southwestern and the River District proposed incorporating terms and conditions in the appropriation that provide for a de minimis amount of consumptive use to be available for modest future municipal and industrial development. Such use could be accommodated within the measurement error inherent in administering the instream flow rates and would not in any way diminish the parties' and CWCB's objective to preserve the natural environment to a reasonable degree.

B. THE CWCB'S HEARING ON THIS INSTREAM FLOW MUST INCLUDE CONSIDERATION OF POLICY ISSUES RAISED BY THE PUBLIC AND CANNOT BE REDUCED TO A ROTE CONSIDERATION OF THE FACTORS IN THE ISF RULES.

The ISF Rules reduce the complex statutory direction to the CWCB for appropriating instream flows to three factors. See CWCB Staff Prehearing Statement ("PHS") at p. 2, Legal Claim B.2. But a legitimate and lawful hearing concerning whether to appropriate an instream flow cannot be limited to a rote consideration of only those three factors. See, e.g., CWCB Staff PHS at p. 2, Legal Claim B.4 (noting that while the ISF Rules do not include consideration of whether a proposed instream flow will deprive the people of the beneficial use of those water available by law and interstate compact, "it is an important policy issue for the Board"). Indeed, the Supreme Court of Colorado has expressly concluded that the appropriation of instream flows is a "prospective policy determination" and that "the purpose of the CWCB's notice, comment, and hearing process is to gather input from the public regarding this policy determination." *Concerning Application for Water Rights of Colorado Water Conservation Bd. in the San Miguel River*, 346 P.3d 52, 59 (Colo. 2015). Failing to consider all legitimate policy concerns voiced by the public as part of the hearing would improperly narrow the CWCB's authority and ignore the purpose stated by the Supreme Court. Therefore, to the extent that CWCB's counsel seeks to limit the CWCB's consideration of policy issues related to the proposed instream flow raised by the parties, the CWCB must decline to do so.

C. FUTURE SMALL-SCALE WATER USERS WILL BE IMPACTED MOST IF APPROPRIATE FLOW RATES AND TERMS AND CONDITIONS ARE NOT ADOPTED BY THE CWCB.

The River District correctly and persuasively identifies an important policy implication that flows from the same concerns raised by Southwestern: by routinely subjecting the Dolores River to a call, adopting the instream flow appropriation as proposed will most impact future small-scale water users with exorbitant costs. See CRWCD PHS at ¶¶ 3 through 7. Southwestern's requests that the CWCB either adopt an explicit depletion allowance of 2.7 cfs or account for measurement error in the administration of the instream flow would address precisely that issue. Only small-scale uses would be able to benefit from such terms and conditions. So recognizing the

need of such uses would provide “a small measure of stability to future small-scale water users” (CRWCD PHS at ¶ 11), thus promoting orderly community development while protecting the environment of the Lower Dolores River. The CWCB should incorporate recognition of measurement error into the administration of any instream flow appropriation it approves for the Lower Dolores River.

D. PREVENTING LISTINGS UNDER THE ENDANGERED SPECIES ACT BY THE U.S. FISH AND WILDLIFE SERVICE IS NOT A CONSIDERATION PERMITTED BY THE INSTREAM FLOW STATUTE, BUT NEGOTIATING A CANDIDATE CONSERVATION AGREEMENT WITH ASSURANCES PRIOR TO APPROPRIATING AN INSTREAM FLOW WOULD MAKE SENSE.

Sheep Mountain Alliance (“SMA”) asks the CWCB to justify adopting the instream flow appropriation as helping avoid listings under the Endangered Species Act. *See* SMA PHS, Ex. A at p. A-4 (stating that “[t]he primary purpose of this ISF is to provide the minimum flows necessary to preserve sensitive fish species and prevent a federal endangered species listing of those species”); *see also* San Miguel County Comments at ¶ 3 (stating that should the environment of certain species not be preserved, “there exists a distinct likelihood that one or more of these species would become candidates for listing”).¹ Nowhere does the instream flow statute authorize the CWCB to appropriate a water right because a federal agency might take an action pursuant to federal law. The CWCB is authorized to consider whether sensitive species are present in the environment it intends to preserve, but it cannot act under the impression that an instream flow will necessarily factor into any listing decision made by the U.S. Fish and Wildlife Service.

Even if the CWCB could consider that objective, appropriating an instream flow, alone, is an ill-suited tool for doing so. A far better approach would be for local, state, and federal agencies and private landowners to negotiate and enter into an appropriate Candidate Conservation Agreement with Assurances under the authority of section 10 of the Endangered Species Act. Under such an agreement Colorado, in collaboration with local governments and other water users, could voluntarily commit to implement specific conservation measures including the appropriation of an instream flow, in exchange for which water users would receive a permit from the Service which would provide assurances that additional conservation measures will not be required and

¹ Contrary to SMA’s allegations, Southwestern very well understands “the legitimate, economic concerns of those in the Basins regarding the impact of an endangered species listing.” *See* SMA PHS, Ex. A at A-4. Southwestern has a proven track record of supporting and participating in species conservation efforts, most especially in the San Juan River Recovery and Implementation Plan process. Southwestern strongly supports voluntary and alternative mechanisms for species conservation in lieu of federal listing.

additional land, water, or resource use restrictions under the Endangered Species Act would not be imposed on them if the species becomes listed in the future, provided the CCAA is being properly implemented. Initiating the CCAA process at an appropriate time would better identify actions expected to avoid listing and provide far more certainty that that objective might be met. Accordingly, to the extent that the CWCB wishes to consider what it might be able to do to prevent a listing of such species, it would be far better, prior to making a decision to appropriate an instream flow on the Dolores River, to begin those discussions and perhaps negotiate and execute a CCAA with the U.S. Fish and Wildlife Service. This consideration, in itself, would support the River District's and Southwestern's request that this matter be remanded to Staff for additional evaluation.

E. THE CWCB HAS STRONG LEGAL AND POLICY JUSTIFICATIONS FOR ADOPTING THE RELIEF REQUESTED BY SOUTHWESTERN AND THE RIVER DISTRICT.

Southwestern's Prehearing Statement detailed the legal bases for the discretion the CWCB enjoys to adopt administrative terms in its intended appropriations of instream flows that appropriately correlate the activities of mankind with some reasonable preservation of the natural environment. *See also* CRWCD PHS at ¶ 11. Even SMA admits, as a legal matter, of the CWCB's "discretion to determine the amount and timing water necessary to preserve the natural environment[] to a reasonable degree" and the General Assembly's intent in conferring authority and discretion on the CWCB that it "correlate the activities of mankind with some reasonable preservation of the natural environment." *See* SMA PHS at pp. 2 and 3; *see also* BLM PHS at ¶ B.8. The CWCB is charged with the fiduciary duty to all the People of the State, in its exclusive role as appropriator of instream flows and its quasi-legislative capacity, to put the State's waters to optimum use giving proper regard to all significant factors, including environmental and economic concerns. And CWCB Staff provides a ready example in recommending that the CWCB adopt a provision in the water court application and decree that will subordinate the instream flow appropriation to certain undecreed uses and exchanges brought to the CWCB's attention within three months of its application. CWCB Staff PHS at p. 2, Legal Claim B.3. Accordingly, nothing in the law prevents the CWCB from adopting the relief requested by Southwestern. To the extent there is any uncertainty regarding the legal and policy issues raised by the parties, the Board should remand the matter to Staff for further evaluation.

F. THE CWCB MUST RECOGNIZE THE NUANCES AND IMPLICATIONS OF THE PROPOSED INSTREAM FLOW ON FUTURE WATER RIGHTS ADMINISTRATION AND USE ON THE LOWER DOLORES RIVER.

Most parties to this proceeding argue that the CWCB need only consider the sheer volume of unappropriated water that will remain in the River if the instream flow appropriation is adopted as proposed. *See* CWCB Staff PHS at ¶ B.4 ("A significant

volume of water will remain available for new junior water rights and future water development.”); BLM PHS at 3 (stating that the proposed instream flow appropriation “leaves a sizable volume of water available for future use and development”). But, as pointed out by Southwestern and the River District, those arguments misrepresent the true impact of the proposed instream flow on water availability and the profound policy implications that will result. CRWCD PHS at ¶¶ 3 through 7; SWCD PHS at pp. 4-7. Although water availability in drought years is an obvious concern, as stated by Hendricks & Western Sky PHS at ¶ A.3, even in median water years a call on the Lower Dolores River would be expected because of the proposed instream flow on a total of 12 days in July, August, and September. SWCD PHS at 5. This means that a call will be placed even more often in approximately half of years. CRWCD PHS at ¶7 (stating that “the unfortunate corollary to the [CWCBA Staff’s] median analysis is that the ISF could be calling junior water rights for the other 50% of the time”).

Another implication of the proposed instream flow appropriating such a high proportion of the flows of the Lower Dolores River is that there is a substantial risk that the Dolores River will be administered with drastic increases and decreases in flows in a step-wise manner. To store and utilize the amount of water posited to be available for future development will require releasing sufficient water to meet decreed senior water rights, including the instream flow, and storing any water not otherwise needed. Because the instream flow rates will dwarf any other senior water rights in magnitude, abrupt flow changes will primarily be dictated by those rates when remaining water available is developed. Therefore, on dates where the proposed instream flow rates drastically increase or decrease, flow in the Lower Dolores River will be instantaneously adjusted to meet those rates. See Figure 1 of the “Staff Analysis and Recommendation” reproduced in the SWCD PHS at 4. For example, between April 14 and 15 it can be expected that releases would be adjusted such that flow in the Lower Dolores River increases from 200 cfs to 900 cfs and that between June 14 and 15 releases would be adjusted from 900 cfs to 400 cfs. Again, this illustrates that focusing solely on the “sizeable volume of water available for future use and development” does not provide a realistic picture of the implications of appropriating such an extreme proportion of available flows as an instream flow.

G. SOUTHWESTERN IS NOT REQUESTING A DECISION THAT IS CONTRARY TO THE ANTI-SPECULATION DOCTRINE OR THE CAN AND WILL TEST.

It is completely inaccurate for SMA to state that “SWCD wants to elevate completely speculative future uses to the status of a decreed water right without meeting any of the requirements that any other water right is required to meet under state law.” See SMA PHS, Ex. A at A-2. Adopting terms and conditions requested by Southwestern would not “elevate” any water use above the instream flow or in any way undermine the preservation of the environment of the Lower Dolores River. Southwestern is not requesting anything akin to a conditional water right. It is requesting a depletion allowance or administrative practice that would allow valid

appropriators to make use of water for orderly municipal and industrial development without requiring new storage projects and augmentation plans. Any future appropriations permitted by such administrative terms would still have to be confirmed in water court, be subject to strict proof, show beneficial use, and comply fully with the law, including the anti-speculation doctrine, the “can and will” requirement, and the terms and conditions of any decree entered for an instream flow.

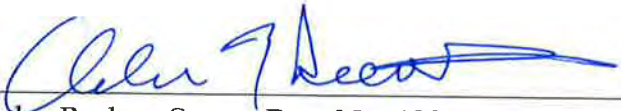
Southwestern’s request for recognition of a de minimis allowance for future development is a proven concept. Southwestern, as a party in the City of Durango’s appropriation of a recreational in-channel diversion water right in 2006, worked cooperatively with the City of Durango, local citizens and governmental entities to balance environmental and other community needs in its proposal. The parties were able to agree on substantial flows of up to 1,400 cfs for the RICD, knowing that doing so would routinely, for the first time, subject the Animas River to administration, because the City was willing to accede to a depletion allowance of 20 cfs to 40 cfs. That approach was decreed, avoided costly and unproductive dispute, has allowed for more than 15 small-scale water rights to be subsequently decreed, and has achieved a legitimate balance that protects the environment and serves all interests of the community.

Because the concepts in Southwestern’s requests have a historic support, it is incorrect and disingenuous for SMA to make its slippery slope argument. *See* SMA PHS, Ex. A at A-4 (asking the CWCB to consider whether incorporating a “carve-out” will require the instream flow to be subordinated to “another legitimate but arguably less popular use of water (such as agriculture)”). In addition to the existing successes of approaches that might be described as a “depletion allowance” or a “carve out,” the CWCB itself has long determined that potential small-scale impacts that might result from junior water rights would have a de minimis impact on instream flows and, therefore, should not be subject to curtailment by a call for an instream flow. *See* CRWCD PHS at ¶ 11.b. None of those decisions by the CWCB have undermined the prior appropriation system. Second, while SMA and other parties have attempted to avoid discussing the complex administrative and policy issues inherent in the proposed instream flow appropriation, Southwestern has suggested that the CWCB initiate a process for all parties to think critically about how the proposed instream flow will be administered and affect future water use under the prior appropriation system. Therefore, if any party “seems unaware of the risks to the prior appropriation system” that the CWCB’s decision at this hearing may have, *see* SMA PHS, Ex. A at A-4, it is SMA and any other parties that do not forthrightly acknowledge the profound policy implications of this unprecedented instream flow proposal. Allegations of “speculative hoarding” and other mischaracterizations of the legitimate policy positions of Southwestern do nothing to assist the CWCB in making a rational policy choice based on an accurate understanding of the law and the facts.

II. CONCLUSION

Southwestern respectfully requests that the matter be remanded to Staff to provide options consistent with the CWCB's fiduciary and statutory duties to appropriate instream flows. If, alternatively, the CWCB does advance an instream flow appropriation for the Lower Dolores River on the basis of the record before it, the CWCB should incorporate a de minimis development allowance and a recognition of measurement error in the terms and conditions for the appropriation.

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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of August, 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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