

BEFORE THE COLORADO WATER CONSERVATION BOARD

STATE OF COLORADO

Rebuttal Statement of Staff of Colorado Water Conservation Board

**IN THE MATTER OF STAFF'S RECOMMENDATIONS FOR AN INSTREAM
FLOW APPROPRIATION ON TERROR CREEK (UPPER AND LOWER
SEGMENTS), WATER DIVISION 4**

Pursuant to Rule 5n(5) 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 rebuttal statement to the Colorado Water Conservation Board ("Board" or "CWCB") in support of Staff's recommendations for instream flow appropriations on Terror Creek, for both the Upper and Lower segments proposed for appropriation.

BACKGROUND:

The CWCB declared its intent to appropriate ISF water rights on two segments of Terror Creek at its January 2015 Board meeting. The Terror Creek Upper segment is a 1.55 mile stretch from the confluence of the East and West Forks to the headgate of the Terror Creek Ditch, all of which is located within BLM-managed lands. The Terror Creek Lower segment is a 1.52 mile stretch from the Terror Creek Ditch headgate to the headgate of the Fire Mountain Canal, approximately 95 percent of which is located within BLM-managed lands.

At the hearing, Staff will demonstrate that the ISF rates claimed for the Terror Creek Upper and Lower segments are based upon standard scientific methodology, reflect the amount of water available for the appropriations, and are necessary to preserve the natural environment to a reasonable degree.

On July 24, 2015, the hearing officer established the following issues for the September 15, 2015 hearing before the Board:

- (1) Whether there is a natural environment that can be preserved to a reasonable degree if the CWCB's water right is granted;
- (2) Whether the natural environment will be preserved to a reasonable degree by the water available for the appropriation; and
- (3) Whether such environment can exist without material injury to water rights.

The Terror Ditch and Reservoir Company (“TDRC”) filed a Notice to Contest the CWCB’s ISF appropriations on March 30, 2015, identifying reasons for its opposition. However, TDRC did not file a Prehearing Statement under ISF Rule 5n(2). Therefore, this Rebuttal Statement responds to the arguments made by TDRC in its Notice to Contest.

To the extent that TDRC raises any issues at the hearing not discussed in its Notice to Contest, the CWCB objects to such arguments and evidence. Further, to the extent that TDRC’s arguments do not relate to the three limited issues to be determined by the Board at the hearing, the CWCB objects to such arguments. Notwithstanding the CWCB’s objections, this Rebuttal Statement will respond to each of the issues TDRC raised in its Notice to Contest.

ARGUMENTS:

1. The CWCB’s ISF appropriations do not, and cannot as a matter of law, conflict with TDRC’s decreed water rights.

TDRC asserts that the CWCB’s appropriations are in conflict with TDRC’s decreed water rights. However, as junior-priority ISF water rights, the CWCB’s appropriation of the Terror Creek Upper and Lower ISF water rights will not cause injury to any other vested water rights. *Colo. Water Conservation Bd. v. City of Central*, 125 P.3d 424, 438-39 (Colo. 2005) (“*Central City*”) (“Because instream flows are administered within the priority system, the instream flow cannot take water away from existing uses and the senior will always be able to make its diversion for its decreed beneficial uses.”) *Colo. Water Conservation Bd. v. City of Central*, 125 P.3d 424, 438-39 (Colo. 2005) (“*Central City*”); *see also* § 37-92-102(3)(b) (ISF appropriations are subject to all present uses or exchanges of water in existence on the date of such appropriation). TDRC’s decreed water rights are fully protected by the prior appropriation system. Additionally, the CWCB’s junior-priority ISF water right is subject to the present uses or exchange of water being made by TDRC, whether or not those uses have been confirmed by decree. § 37-92-102(3)(c). For those reasons, new ISF water rights on Terror Creek do not, and cannot as a matter of law, conflict with TDRC’s decreed water rights or its undecreed present uses of water.

2. The CWCB’s ISF appropriations do not infringe on TDRC’s legal ability to change its water rights.

TDRC asserts that the CWCB’s appropriations infringe “on future proposed, legal changes in water administration of existing priority rights.” The CWCB assumes TDRC’s objection relates to TDRC’s legal right to change its water rights for other uses or places of use in the future.

Every change of a water right is “subject to the limitation that such change not injure the rights of junior appropriators.” *Central City*, 125 P.3d at 440. Therefore, no water right owner possesses an unqualified entitlement to change a water right to the detriment of any water users—including those users downstream of TDRC’s water rights. Like any junior or senior-priority water right holder, the CWCB will be entitled to participate in future change of water right proceedings if the proposed change could cause injury to decreed ISFs on Terror Creek. However, any such participation is limited to ensuring that the proposed change by the water user will not cause injury to the ISF. This no-injury standard applies to all change of water right proceedings. The appropriation of ISFs on Terror Creek does not change any legal standard to be imposed on the change in a future court proceeding and does not prevent any water user, including TDRC, from exercising its lawful right to change any of its water rights.

3. Water is available for the CWCB’s use to preserve the natural environment to a reasonable degree.

TDRC asserts that water released from Bruce Park Reservoir, and water in West Terror Creek, is fully decreed and subject to the water commissioner’s administration of senior rights. However, the CWCB’s statutory authority does not limit its claims for instream flow water rights to only “native” flow—or “undecreed water”—to preserve the natural environment to a reasonable degree. Rather, the General Assembly vested the CWCB with the authority to appropriate “such waters of natural streams and lakes” to preserve the natural environment to a reasonable degree. Appropriators of water for both non-consumptive and consumptive uses may use a reservoir release. For example, a non-consumptive user, like a hydroelectric power plant, may divert a reservoir release before the release is diverted again downstream for its intended use. Similarly, a water user could exchange a reservoir release upstream and replace a substitute supply at a downstream point above the downstream user to whom the reservoir release was directed. Like such users, the CWCB is entitled to claim a right to use any water in the stream available for the CWCB’s non-consumptive beneficial use of preserving the natural environment. The CWCB’s non-consumptive use of such water embraces and embodies the doctrine of maximum utilization, as directed and promoted by the General Assembly and Colorado Supreme Court.

The public’s water resource is subject to maximum utilization, a doctrine intended to make water available for as many decreed uses as there is available supply. Within the priority system, maximum utilization spreads the benefit of the public’s water resources to as many uses as possible, within the limits of the physically available water supply”

Pagosa Area Water & Sanitation Dist. v. Trout Unlimited, 170 P.3d 307, 314 (Colo. 2007) (citations omitted); see § 37-92-102(1)(a).

Many existing decreed ISF water rights are located above senior water rights that call water through the ISF reach. When a decreed ISF can use water released from a reservoir or called through an ISF reach by a downstream senior, the water is put to maximum use and spreads the benefit of the resource to as many uses as possible. In this way, the CWCB is entitled to use any water available in an ISF reach for preservation of the natural environment—even when such water is being called for by a senior user downstream or released from an upstream reservoir.

4. The CWCB's appropriations of ISFs on Terror Creek are based on the amount of water necessary to preserve the natural environment to a reasonable degree

TDRC raises a concern that the CWCB's ISF determinations did not consider natural variability and climate change. However, the CWCB's analyses on the amount of water available to preserve Terror Creek's natural environment to a reasonable degree were based on a variable flow regime that includes both wet and dry periods. CWCB staff analyzed the best available data for the proposed segments. This included data from the Terror Creek at mouth near Bowie, CO USGS gage for the period of 2001 to 2013, a period of unusually dry hydrologic conditions. For this reason, the hydrological data and resulting median hydrographs are extremely conservative concerning the amount of water available for preservation of the natural environment. Additionally, the CWCB included analysis of diversion records that extend from 1969 to 2013 in order to provide a more complete picture of the water available during naturally-variable hydrologic cycles. The CWCB's analyses demonstrate that water is available for appropriation at the rates requested, and times of year requested, for the Terror Creek ISF water rights as described in the CWCB's Executive Summary.

Based on statements in TDRC's Notice to Contest regarding climate change and on discussions with TDRC at a meeting on June 24, 2015, TDRC may be concerned that the CWCB's proposed fixed calendar dates for each particular flow recommendation may not match the timing and magnitude of water that may be available in a particular future year. However, the anticipated impacts of climate change are unknown. No water right in the State of Colorado is required to consider the potential effects of climate change when appropriated. The ISF program should not be held to a different standard than all other water rights. Considering potential effects of climate change may be appropriate to firm-yield analyses used for water development projects, but not an ISF water right that is based on water only being available 50% of the time.

Evaluating climate change projections is not part of the Board's standard method for water availability determinations. Climate model projections show a broad range of potential streamflow conditions by 2050. It is unclear how this

range could inform an ISF's rates and timing for an appropriation made today. For example, peak runoff may shift to earlier in the spring, but the ISF program cannot appropriate higher flows in the spring than currently exist.

Climate change is an issue facing the natural environment as well as humankind. Climate change that outpaces an ecosystem's ability to adapt poses serious problems. In the face of climate change, ISF water rights to preserve the natural environment will become increasingly important. If changes to stream regimes caused by climate change render ISF water rights less effective at such preservation, the CWCB may need to develop tools to address the problem, similar to modification of ISF water rights under ISF Rule 9. For all of the above reasons, it is neither appropriate nor necessary to base ISF water rights on climate change projections.

Moreover, to the extent that TDRC objects to “calendar-based administrative requirements” that could be “destructive to our water right directly,” such fears are misplaced. “Because instream flows are administered within the priority system, the instream flow cannot take water away from existing uses and the senior will always be able to make its diversion for its decreed beneficial uses.” *Central City*, 125 P.3d at 438-39. Regardless of the impacts of climate change—or, the continued hydrologic variability that has occurred on the Colorado Plateau for centuries, the CWCB’s water right is junior to TDRC’s decreed water rights. Administration of the CWCB’s junior-priority ISF water right cannot, and will not, cause injury or otherwise impair, in any way, TDRC’s exercise of its existing decreed water rights for their decreed purposes.

5. The “ultimate goal” of the CWCB’s ISF appropriations on Terror Creek is to decree the minimum amount of water necessary to preserve the natural environment to a reasonable degree.

Contrary to the assertions of TDRC, the purpose of the ISF program is clearly established by the CWCB’s authorizing legislation and its fiduciary duty to the citizens of Colorado to appropriate “such waters of natural streams and lakes as the board determines may be required for minimum stream flows . . . to preserve the natural environment to a reasonable degree.” § 37-92-102(3), C.R.S. The CWCB is constrained by the limits of the law to appropriate such a minimum amount of water necessary to preserve the natural environment. However, as confirmed by the Colorado Supreme Court, the General Assembly did not enumerate “the forms of plant and animal life, as well as natural formations, which the legislature wished to preserve,” but rather gave such authority to the CWCB to determine in its discretion on a case-by-case basis. *Colo. River Water Conservation Dist. v. Colo. Water Conservation Bd.*, 594 P.2d 570, 576 (Colo. 1979). “Factual determinations regarding such questions as which areas are most amenable to preservation and what life forms are presently flourishing or capable of flourishing should be

delegated to an administrative agency which may avail itself of expert scientific opinion.” *Id.* at 577.

Here, the CWCB has confirmed the existence of self-sustaining populations of speckled dace and native cutthroat trout in the proposed Terror Creek ISF segments. Those fish species indicate the presence of a natural environment that can be preserved to a reasonable degree by the water right claimed by the CWCB. Further, as found by the CWCB and the BLM, “the riparian community [in the Terror Creek ISF segments] is in very good condition, provides adequate shading and cover for fish habitat, and provides stream stability during flood events.” See Terror Creek (Upper) Executive Summary, at 3. The CWCB’s appropriation of the Terror Creek ISFs is based solely on the existence of this natural environment, biological analyses of the minimum amount of water necessary to ensure the preservation of that natural environment, and a determination that water is available for such use in the stream.

The purpose of the CWCB’s ISF program is to implement the CWCB’s statutory authority to appropriate ISF water rights for a minimum flow necessary for reasonable preservation of the natural environment. The CWCB exercises its authority through analyses of the natural environment that exists today, determination of water available for appropriation, and a scientifically-supported conclusion on the water available for minimum flows that will reasonably preserve the natural environment. The CWCB’s appropriations are intended to maintain hydrological conditions that will support fish species, macroinvertebrates, and riparian communities. Acting under its statutory authority, the CWCB has determined that the natural environment of Terror Creek—including fish, macroinvertebrates, and the riparian vegetation—can be preserved to a reasonable degree with the water available for the ISFs on Terror Creek.

Dated this 17th day of August, 2015

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CERTIFICATE OF SERVICE

I hereby certify that I have duly served the copies of the foregoing **REBUTTAL STATEMENT OF THE STAFF OF THE COLORADO WATER CONSERVATION BOARD** upon all parties herein by email, this 17th day of August, 2015, addressed as follows:

Hearing Officer

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